119-108

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~649.~~ ~~382~~ ~~107~~ 21

THE CITY OF OPELIKA, PLAINTIFF IN ERROR,

vs.

RICHARD C. DANIEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

FILED OCTOBER 18, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 649.

THE CITY OF OPELIKA, PLAINTIFF IN ERROR,

vs.

RICHARD C. DANIEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

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1 May term, A. D. 1879.

At a circuit court of the United States, for the fifth judicial circuit and middle district of Alabama, begun and holden at Montgomery, Alabama, on the first Monday of May, in the year of our Lord one thousand eight hundred and seventy-nine, present and presiding the honorable John Bruce, judge of the district courts of the United States for the State of Alabama, sitting as circuit judge, Friday, May 9th, 1879, a day of said term, the following proceedings were had:

* * * * * * *

Summons.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

The President of the United States of America to the marshal of said district, greeting:

You are hereby commanded to summon the city of Opelika, formerly the town of Opelika, a municipal corporation created, organized, and existing under and by virtue of the laws of Alabama, and which
2 city of Opelika, formerly the town of Opelika, is a citizen of the State of Alabama, to appear before the hon. circuit court aforesaid, at the place of holding said court, at Montgomery, on the first Monday of May next, to answer the complaint of Richard C. Daniel, who is a citizen of the State of Tennessee; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 20th day of March, in the year of our Lord one thousand eight hundred and seventy six. Issued the 20th day of March, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] J. W. DIMMICK,
Clk U. S. Cir. Court, Mid. Dist. of Ala.

Complaint.

UNITED STATES OF AMERICA:

In the circuit court of the United States for the middle district of Alabama, May term, 1876.

Richard C. Daniel, who is a citizen of the State of Tennessee, complains of the city of Opelika, formerly called the town of Opelika,
3 a municipal corporation duly organized and existing under and by virtue of the laws of the State of Alabama, which said corporation is a citizen of the State of Alabama, and of the district aforesaid; and thereupon said plaintiff claims of said defendant, which is a corporation duly incorporated and treated as such by the laws of the State

of Alabama, the sum of five thousand dollars, being the amount due upon and for one hundred and nineteen coupons which were attached to twenty-four of the bonds of said corporation, which said bonds are numbered from two to twenty-five, both inclusive; each of said bonds being in legal effect and substance, as follows, to wit:

UNITED STATES OF AMERICA:

STATE OF ALABAMA, COUNTY OF LEE, TOWN OF OPELIKA.

No 2.] *Twenty-year eight per cent. bond.* [$1,000.

Issued in payment of stock of the Eufaula, Opelika, Oxford and Guntersville Railroad.

Know all men by these presents that the town of Opelika, in the county of Lee, and State of Alabama, acknowledges to owe the Eufaula, Opelika, Oxford and Guntersville Railroad Company, or the bearer hereof, one thousand dollars, on the first day of January, A. D.
4 eighteen hundred and ninety, at the agency of the Eufaula, Opelika, Oxford and Guntersville Railroad Company, in the city of New York, with interest thereon at the rate of eight per centum per annum, payable on the first days of July and January of each year, at said agency in the city of New York, upon the presentation and surrender of the coupons hereto attached as they severally become due. This bond being one of a series of twenty-five bonds of one thousand dollars each, numbered from one to twenty-five, inclusive, making an aggregate of twenty five thousand dollars, issued by said town of Opelika, under authority and in pursuance of an act of the general assembly of the State of Alabama entitled "An act to authorize the several counties, towns, and cities of Alabama, to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their interests," approved December 31, 1868.

In witness whereof the mayor and treasurer of said town of Opelika have signed this bond this first day of January, A. D. eighteen hundred and seventy.

(On the margin:) 1,000 dollars.

P. J. WILKERSON, *Mayor.*
J. E. WILLIAMSON, *Treasurer.*

Attached to each of said bonds were forty coupons, numbered
5 from one to forty, inclusive, the first coupon on each of said bonds being in substance and legal effect as follows:

THE STATE OF ALABAMA,
County of Lee, Town of Opelika:

Forty dollars will be due and payable on the 1st day of July, 1870, at the agency of the Eufaula, Opelika, Oxford and Guntersville R. R. Co., in the city of New York, being six months' interest on bond No. 2 for $1,000, issued by said town of Opelika in payment of subscription to Eufaula, Opelika, Oxford and Guntersville R. R. Co.

$40. J. E. WILLIAMSON,
Treasurer.

All the other coupons on said bonds were of the same substance and legal effect, with the exception of the dates of payment thereof; the first coupon on each of said bonds being payable as aforesaid on the

first day of July, 1870, and each one of said coupons successively following due semi-annually thereafter, until and up to and including the first day of January, 1890.

There are now due on said twenty-four bonds one hundred and nineteen coupons which are unpaid, being five coupons due on bond numbered two (2), and four coupons due on bond numbered three (3), and five coupons due on each of said bonds numbered from four (4) to twenty-five (25), both inclusive. All and each of said coupons are unpaid, and are each for forty dollars, and were attached to bonds of said defendant as above described, and numbered from two to twenty-five, both
6 inclusive, the said coupons being numbered to correspond with the numbers on each of said bonds to which they belonged, and which coupons are sued for in this action. The said five coupons which were attached to the said bond numbered two (2) of defendant fell due, each respectively, on the 1st day of January, 1874; the 1st day of July, 1874; the 1st day of January, 1875; the 1st day of July, 1875; and the 1st day of January, 1876; the said four coupons which were attached to each of the said bonds of defendant, numbered three (3), fell due, each respectively, on the 1st day of January, 1874; the 1st day of January, 1875; the 1st day of July, 1875; and the 1st day of January, 1876; and the said five coupons which were attached to each of the said bonds of the defendant, numbered from four to twenty-five, both inclusive, fell due, each respectively, on the 1st day of January, 1874; the 1st day of July, 1874; the 1st day of January, 1875; the 1st day of July, 1875; and the 1st day of January, 1876; which said coupons amount in the aggregate to the sum of four thousand seven hundred and sixty dollars.

The plaintiff avers that each and every one of said coupons, to wit, said one hundred and nineteen coupons, above described, together with interest thereon from the dates at which they severally fell due, are still due and unpaid. And the said plaintiff further avers that he is the bona fide owner and bearer of said one hundred and nineteen
7 coupons above described, which, together with the said bonds to which they were attached, were executed and put in circulation with the other coupons above mentioned by said defendant, and which said one hundred and nineteen coupons above described were purchased by plaintiff for value before any of them fell due. The plaintiff avers that at the time the said one hundred and nineteen coupons above described fell due, the Eufaula, Opelika, Oxford and Guntersville Railroad Company, then known as the East Alabama and Cincinnati Railroad Company, had no agency in the city of New York, and further avers that said defendant had no funds at any agency in said city of New York wherewith to pay said coupons at the time the same fell due. That long before the same fell due, at the time they fell due, and ever since their maturity, the said defendant repudiated all liability to pay said coupons, and refused to acknowledge any liability therefor.

This suit is brought to recover the amount due on said one hundred and nineteen coupons, hereinab've described as having fallen due before this suit was commenced, and interest thereon, according to their tenor and effect. All of which defendant has hitherto and does still wholly fail and refuse to pay, to the damage of the plaintiff five thousand dollars.

Wherefore he sues.

SAYRE & GRAVES,
RICE, JONES & WILEY,
Pl'ff's A'tt'ys.

Received in office this 23rd day of March, 1876.

R. W. HEALY,
U. S. Marshal.

Executed by serving copy of the within summons and complaint on the defendant, Loxla Edwards, mayor of the city of Opelika, this 20th day of March, 1876.

R. W. HEALY,
U. S. Marshal.
By J. D. WILLIFORD,
Deputy.

Amendment to complaint.

In the circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA. } No. 105.

The plaintiff, by leave of the court first had and obtained, amends his complaint by inserting the following, as the numbers and description of the coupons sued on in this action, in lieu of the numbers and description of those mentioned and described in the complaint, to wit:

There are now due on said twenty-four bonds ninety coupons which are unpaid, being two coupons due on bond numbered two, and two coupons due on bond numbered three, and three coupons due on each of said bonds numbered respectively, four, five, seven, nine, ten, eleven, twelve, thirteen, fourteen, seventeen, eighteen, and twenty-one; and five coupons due on each of said bonds numbered respectively,
9 six, eight, fifteen, sixteen, nineteen, twenty, twenty-two, twenty-three, twenty-four, and twenty-five, all and each of said coupons are unpaid, and are each for forty dollars, and were attached to bonds of said defendant as above described in the complaint, and numbered from two to twenty-five inclusive, the said coupons being numbered to correspond with the numbers on each of said bonds to which they belonged, and which coupons are sued for in this action.

The said two coupons, which were attached to the said bond numbered two of defendant, fell due, respectively, each on the 1st day of January, 1874, and the 1st day of July, 1874; and the said two coupons which were attached to each of the said bonds of defendant, numbered three, fell due each, respectively, on the 1st day of January, 1874, and the 1st day of January, 1875; and the said three coupons which were attached to each of said bonds of defendant, numbered, respectively, four, five, seven, nine, ten, eleven, twelve, thirteen, fourteen, seventeen, eighteen and twenty-one, fell due each, respectively, on the 1st day of January, 1874, the 1st day of July, 1874, and the 1st day of January, 1875; and the said five coupons which were attached to each of said bonds of the defendant, numbered, respectively, six, eight, fifteen, sixteen, nineteen, twenty, twenty-two, twenty-three, twenty-four and twenty-five fell due each, respectively, on the 1st day of January, 1874, the 1st day
10 of July, 1874, the 1st day of January, 1875, the 1st day of July, 1875, and the 1st day of January, 1876; which said coupons amount, in the aggregate, to the sum of thirty-six hundred dollars.

And, also, by inserting the words "ninety coupons," where the words "one hundred and nineteen coupons" occur in the complaint.

SAYRE & GRAVES AND
RICE & WILEY,
Pl'ff's Att'ys.

Filed the 9th of May, 1879, in open court.

J. W. DIMMICK, *Clerk.*

Circuit court of the United States for the middle district of Alabama, in the fifth judicial circuit. May term, 1876.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

And the said City of Opelika, defendant, according to the form of the statute in such cases made and provided, states and shows to the court here the following causes of demur'er to the said declaration, to wit:

Demur'er to complaint.

1. It appears in and by said complaint or declaration that the said supposed bonds and coupons, alleged to have been made and issued by this defendant, if made and issued at all, were made and issued payable to the said Eufaula, Opelika, Oxford and Guntersville Railroad Company, a corporation created under the laws of the State of Alabama, and located and doing business in said State, and it does
11 not appear in and by said complaint that said alleged bonds and the coupons sued on in this action have ever been indorsed by said Eufaula, Opelika, Oxford and Guntersville Railroad Company to the said plaintiff.

2. It appears in and by said complaint that the said alleged coupons sued on in this action are the property of the Eufaula, Opelika, Oxford and Guntersville Railroad Company, and not the property of the plaintiff.

3. It does not appear from said complaint that the said Eufaula, Opelika, Oxford & Guntersville Railroad Company, to whom said alleged bonds and coupons are made payable, could have maintained suit thereupon in this court.

4. It appears in and by said complaint that the said alleged bonds and coupons in said complaint mentioned, if made and issued at all by this defendant, were made and issued payable to the Eufaula, Opelika, Oxford & Guntersville Railroad Company, and no facts are averred in said complaint showing that said company could have maintained suit in this court on said bonds and coupons.

5. It does not appear in and by said complaint that this court has jurisdiction of said suit.

6. It does not appear in and by said complaint that the said
12 defendant had any power or authority under its charter or otherwise, to make said alleged bonds and coupons payable without the State of Alabama and in the city of New York.

Wherefore the said defendant prays judgment, and that the said plaintiff may be barred of his aforesaid action thereof against it.

BARNES & SON,
BRAGG & THORINGTON,
Attorneys for Def't.

By consent of counsel defendant amends its demur'er by adding thereto the following, to wit:

7. It does not appear from said complaint that the coupons sued on are negotiable paper, or that they are of such a nature as to support an action thereon independent of the bonds to which they were attached.

8. The complaint fails to set forth any fact or facts which show that the plaintiff is entitled to an action on said alleged coupons as against said defendant.

9. It appears from said complaint that the plaintiff's remedy, if any he has, is by an action on said bonds and not on said coupons.

BARNES & SON,
BRAGG & THORINGTON,
Defendant's Attorneys.

Filed 9th Nov'r, A. D. 1876.

J. W. DIMMICK, *Clerk.*

13 *Plea No.* 1.

In the circuit court of the United States for the middle district of Alabama.

RICHARD. C. DANIEL
vs. } No. 1.
CITY OF OPELIKA.

And the said defendant comes by attorney and defends the wrong and injury, when, &c., and saith that it did not undertake or promise in manner or form, as the plaintiff aforesaid hath above thereof complained against it, and of this it puts itself upon the country, &c.

W. H. BARNES & SON.
BRAGG & THORINGTON,
Attorneys for Def't.

Pl'ff takes and joins issue on the foregoing plea, numbered 1, in short, by consent.

SAYRE & GRAVES,
Att'ys for Pl'ff.

Plea No. 2.

Circuit court of the United States for the middle district of Alabama, in the 5th circuit, May term, 1876.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

Comes the said defendant by attorney and defends the wrong and injury, when, &c., and says that the said plaintiff, his aforesaid action thereof against this defendant ought not to have or maintain because it says that the said alleged bonds in said complaint mentioned,
14 and for the semi-annual interest on which the coupons sued on in this action were given, are made payable to the Eufaula, Opelika, Oxford and Guntersville Railroad Company, a railroad corporation created under and by virtue of the laws of the State of Alabama, and that the said corporation was at the time said bonds and coupons were

made and issued, a citizen of the State of Alabama, and was such up to and at the time this action was commenced, and is now, which said corporation is now known and called by the name and style of the East Alabama and Cincinnati Railroad Company, and that said plaintiff holds and owns said coupons, if at all, as the assignee or transferee of said railroad company, and not otherwise, and this it is ready to verify. Wherefore it prays judgment whether or not the said plaintiff ought further to have or maintain his aforesaid action thereof against this defendant.

BARNES & SON,
BRAGG & THORINGTON,
Defendant's Attorneys.

Before me, J. C. Meadors, a United States commissioner, &c., this day came Loxla Edwards, who makes oath that he is mayor of said city of Opelika, and that the foregoing plea is true in substance and fact.

LOXLA EDWARDS, *Mayor.*

15 Sworn to and subscribed before me this 10th day of May, 1876, at Opelika, Alabama.

JOHN C. MEADORS,
U. S. Commissioner.

STATE OF ALABAMA,
Lee County:

Before me, John M. Chilton, a United States commissioner in and for the middle judicial district of Alabama, this day personally appeared Rinaldo M. Greene, who, being duly sworn, states on oath that he is the mayor of the city of Opelika, and that the foregoing plea is true in substance and fact.

R. M. GREEN,
Mayor City Opelika.

Sworn to and subscribed before me this 10th day of Sept., 1877.
[SEAL.] JOHN M. CHILTON,
U. S. Commissioner, Mid. Dist. of Ala.

STATE OF ALABAMA,
Lee County:

Before me, John M. Chilton, a United States commissioner in and for the middle judicial district of Alabama, this day personally appeared Loxla Edwards, who, being duly sworn, doth state on oath that he is the mayor of the city of Opelika, and duly authorized to make this affidavit, and that the foregoing plea is true in substance and in fact, according to the best of affiant's knowledge, information, and belief.

L. EDWARDS, *Mayor, &c.*

16 Sworn to and subscribed before me this 5th day of May, A. D. 1879.

J. M. CHILTON,
U. S. Commissioner, Middle District of Alabama.

Plaintiff demurs in short by consent to the foregoing plea numbered 2, and specifies & assigns as the grounds and causes of this demurrer, the following, to wit:

1. Said plea contains no statement or averment or anything else which does or can constitute a bar or defence to this action.

2. Said plea neither avers nor states any facts which answers the complaint.

3. The facts stated in the plea constitute no defence to this action.

4. That the facts stated in said plea are of such a character that any issue thereon would be immaterial, all in short by consent.

SAYRE & GRAVES,
Att'ys for Pl'ff.

Filed May 7th, 1879.

J. W. DIMMICK, *Clerk.*

Plea No. 3.

In the circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

Comes the defendant in the above stated cause and by like leave of the court for a further plea in said cause says, that the alleged
17 coupons sued on in this cause are not the property of the said plaintiff, and were not at the time said suit was instituted, and that the said plaintiff is not entitled to maintain said suit as the same is brought.

W. H. BARNES & SON,
BRAGG & THORINGTON,
Att'ys for Defendant.

STATE OF ALABAMA,
County of Lee:

Before me, John M. Chilton, a United States commissioner in and for the middle judicial district of the State of Alabama, this day personally appeared Rinaldo M. Green, mayor of the city of Opelika, the said defendant, and makes oath that the foregoing plea is true in substance and fact.

R. M. GREEN,
Mayor City Opelika.

Sworn to & subscribed before me this 10th day of Sept., 1877.

JNO. M. CHILTON,
U. S. Com'r.

STATE OF ALABAMA,
Lee County:

Before me, John M. Chilton, a United States commissioner in and for the middle district of the State of Alabama, this day came Loxla Edwards, who, being duly sworn, doth state on oath that he is the mayor of the city of Opelika, the said defendant, and duly authorized to make this affidavit, and that the within plea is true in substance and
18 in fact according to the best of affiant's knowledge, information, and belief.

L. EDWARDS,
Mayor City of Opelika.

Sworn to & subscribed before me this 5th day of May, 1879.

J. M. CHILTON,
U. S. Com'r, Mid. Dist. Ala.

Plaintiff joins and takes issue on this plea numbered 3, in short, by consent.

SAYRE & GRAVES,
Att'ys for Pl'ff.

Filed May 7th, 1879.

J. W. DIMMICK, *Clerk.*

Plea No. 4.

Circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

Comes the said defendant and for further plea in this behalf, by like leave of the court first had and obtained, and says that the said plaintiff, his aforesaid action thereof against this defendant, ought not further to have or maintain, because it says that before and at the time said alleged bonds and coupons were issued no proposition had ever been submitted by the president and a majority of the directors of the said Eu-
19 faula, Opelika, Oxford and Guntersville Railroad Company to this defendant in writing, proposing to this defendant that it should subscribe for and take any amount of the capital stock of said railroad company set forth in said proposal at a certain price per share and pay for the same in bonds of this defendant set forth in said proposal, nor was any such proposal delivered to the corporate authorities of this defendant, nor was any such proposition from said railroad company approved by the corporate authorities of this defendant nor a majority thereof, nor was any resolution to that effect passed by said corporate authorities nor a majority thereof, nor was any such resolution entered upon the minutes of said corporate authorities within ten days after receiving such proposal, nor was such proposal submitted nor any special election ordered or conducted by said corporate authorities according to the requirements of law for holding elections for town officers in the said town of Opelika; and defendant further avers that the said plaintiff is not a bona fide holder, without notice, of the said coupons sued on in this action, and this the defendant is ready to verify, &c.

W. H. BARNES & SON,
20 BRAGG & THORINGTON,
Def't's Att'ys.

Before , Jno. M. Chilton, a United States commissioner in and for said middle district, this day appeared R. M. Green, mayor of said city of Opelika, and who being duly sworn, states on oath that the foregoing plea is true in substance and fact to the best of his knowledge, information, and belief.

R. M. GREENE,
Mayor City Opelika.

Sworn to & subscribed before me this 10th day of Sept., A. D. 1877.
JOHN M. CHILTON
U. S. Com'r, Mid. Dist. Ala.

STATE OF ALABAMA,
Lee County:

Before me, John M. Chilton, United States commissioner in and for

the middle judicial district of Alabama, this day personally appeared Loxla Edwards, who, being duly sworn, doth state on oath that he is the mayor of the city of Opelika, the said defendant, and that the within plea is true in substance and in fact according to the best of his knowledge, information, and belief.

L. EDWARDS,
Mayor of City of Opelika.

Sworn to & subscribed before me this 5th day of May, A. D. 1879.
JOHN M. CHILTON,
U. S. Com'r, Mid. Dist. of Ala.

21 Plaintiff takes and joins issue on this plea numbered 4.
SAYRE & GRAVES,
Att'ys for Plaintiff.

Filed May 7th, 1879.
J. W. DIMMICK, *Clerk.*

Plea No. 5,

In the circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL }
vs. {
CITY OF OPELIKA. }

Comes the said defendant and for further plea in this behalf, by leave of the court first had and obtained, says that said supposed bonds in said declaration mentioned, are not the bonds or deeds of this defendant, and that the said alleged coupons mentioned in said declaration are not the coupons or deeds of this defendant, and of this it puts itself upon the country.

W. H. BARNES & SON,
BRAGG & THORINGTON,
Defendant's Attorneys.

Before me, John M. Chilton, a United States commissioner in and for the middle judicial district, this day personally appeared Rinaldo M. Greene, known to me to be the mayor of the city of Opelika, the
22 above-named defendant, who, being by me duly sworn, makes oath that the foregoing plea is true in substance and fact to the best of his knowledge, information, & belief.

R. M. GREENE,
Mayor City Opelika.

Sworn to & subscribed before me this 10th day of Sept., A. D. 1877.
[SEAL.] JNO. M. CHILTON,
U. S. Com'r, Mid. Dist. of Alabama.

STATE OF ALABAMA,
Lee County:

Before me, John M. Chilton, a United States commissioner in and for the middle judicial district of the State of Alabama, this day personally appeared Loxla Edwards, who, being duly sworn, doth state on oath that he is the mayor of the said city of Opelika, the said defendant, and that

the within plea is true in substance and in fact according to the best information, knowledge, and belief of affiant.

L. EDWARDS,
Mayor of the City Opelika.

Sworn to and subscribed before me this 5th day of May, A. D. 1879.
JOHN M. CHILTON,
U. S. Com'r, Mid. Dist. of Alabama.

Filed May 7th, 1879.

J. W. DIMMICK, *Clerk.*

23 *Order sustaining demurrer to def't's pleas No'. 2 & 5, &c. Judgment.*

FRIDAY, *May 9th*, 1879.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA. } No. 105.

Came the parties by their attorneys and the defendant demurs to plaintiff's complaint, and the said demurrer is overruled by the court, and the defendant files his several pleas, upon the first, third, and fourth of which the plaintiff takes issue, and moves to strike out the second and fifth pleas, which is granted; and plaintiff asks leave to amend his complaint, which is allowed and filed; and thereupon comes a jury of twelve good and lawful men, to wit, David S. Arnold and eleven others, who being duly elected, tried, and sworn, well and truly to try the issue joined between the parties and a true verdict render according to the evidence, upon their oaths do say, they find for the plaintiff, and assess his damages at four thousand seven hundred and fifty-five dollars and sixty-four cents ($4,755.64). It is therefore considered by the court that said plaintiff recover of said defendant the said sum of four thousand seven hundred and fifty-five dollars & sixty-four cents ($4,755.64), together with the costs in this behalf expended, for which let execution issue.

24 *Bill of exceptions.*

In the circuit court of the United States for the middle district of Alabama, in the 5th circuit. May term, 1879.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA. }

Be it remembered that this cause came on to be heard on this 9th day of May, 1879, being a day of said term, when the following proceedings were had, to wit: The plaintiff moved the court to strike from the files the plea of the defendant numbered five (5), on the following grounds:

1. That said plea does not conform to the form prescribed by the code of Alabama.

2. That the affidavit to said plea is made on information and belief The court granted said motion, and the said plea was stricken from the files by the court on the grounds aforesaid; and to this ruling of the court the defendant then and there excepted. The defendant then moved the court for leave to file the plea numbered six, which is in the following words, to wit:

No. 6.

25 In the circuit court of the United States for the middle district of Alabama. May term, 1876.

RICH'D C. DANIEL
vs.
CITY OF OPELIKA.

Comes the said defendant, and by like leave of the court in this behalf first had and obtained, and for further answer to said complaint, saith, that the coupons upon which this action is founded were not executed by it, or by any one authorized to bind it in the premises.

W. H. BARNES & SON,
BRAGG & THORINGTON,
Def'd't's Att'ys.

Before me, J. W. Dimmick, clerk of said court, personally came Loxla Edwards, who, being duly sworn, doth state on oath that he is mayor of the city of Opelika, the defendant, and that, as he is informed and believes, and so states the facts to be, the foregoing plea is true in substance and in fact.

LOXLA EDWARDS.

Sworn to & subscribed before me this 7th day of May, A. D. 1879.
J. W. DIMMICK, *Clerk.*

26 The plaintiff thereupon objected to the filing of said last-named plea on the ground that the affidavit thereto was made on information and belief. The court sustained the plaintiff's said objection and denied the motion of the defendant for leave to file the said last-named plea; and to this ruling of the court the defendant then and there excepted.

The plaintiff then introduced witnesses who testified to the signature of P. J. Wilkerson, as mayor, to the bonds, and to the signature of J. E. Williamson, as treasurer, to the bonds and coupons described in the complaint, and that said Wilkerson was mayor of the said town of Opelika, and the said Williamson was treasurer of said town at the time they signed said bonds and coupons as aforesaid; and thereupon the plaintiff offered to introduce in evidence the twenty-four bonds and the ninety coupons described in the complaint and amended complaint; and to the introduction of said bonds and coupons in evidence, the defendant then and there objected on the following grounds:

1. That the said bonds and coupons offered in evidence purport to have been made by the town of Opelika, and not by this defendant.

27 2. That said bonds and coupons are irrelevant and incompetent testimony as against the defendant.

The court overruled these objections of the defendant, and admitted said bonds and coupons in evidence; and to this ruling of the court the defendant then and there excepted.

At the time of offering said bonds and coupons in evidence, the plaintiff also offered in connection therewith the act of the legislature of the State of Alabama incorporating the defendant, and the amendments thereto, as follows:

An act entitled "An act incorporating the town of Opelika," approved February 9th, 1854.

"An act to amend 'An act incorporating the town of Opelika, approved February 9th, 1854,'" approved February 8th, 1860.

"An act to establish a new charter for the city of Opelika," approved March 3, 1870.

"An act to amend the charter of the city of Opelika," approved December 19th, 1871, and also an act entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests," approved December 31st, 1868.

28 And here the plaintiff rested in his proof.

The defendant then introduced in evidence the deposition of the plaintiffs taken on behalf of defendant on the 22nd day of May, 1877, and which is in the following words:

In the circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

Interrogatories to be propounded to Richard C. Daniel, a material witness for the defendant in the above-stated cause:

1st interrogatory. Where do you reside? What is your age and occupation? Are you the plaintiff in this suit? How long have you resided where you now reside, and how long have you been in the business you now follow? and where did you reside before you came to the place you are now living at? And how long have you resided where you are now living?

2nd interrogatory. State fully and particularly the cause of action in the case—describe the instrument sued on, if you say they are coupons; then describe the bonds to which they belong. State by whom such bonds were issued, when, for what amount each; how many
29 constitute the series; to whom are they payable, where payable; at what rate of interest; by whom are they signed and when payable. What coupons are embraced in the suit; how many, and when did they fall due, and what are their numbers? When did you come into possession of said coupons, and where and from whom and for what consideration and under what agreement? and, if such agreement is in writing, attach the same hereto; if verbal, state the terms thereof as well as you remember them. If you say you purchased said coupons, then state if such purchase was for a consideration that passed at the time or for a consideration that arose prior thereto, and what the consideration in fact was, from whom you purchased them, and where and when, and whether you bought them absolutely or took them as collateral security; and from whom did the person from whom you received them get them?

2nd interrogatory. From whom and when did you first learn of the existence of said coupons? and if such information was in writing attach the same to your answers hereto; and if verbal state the
30 substance of it. Give all the facts and circumstances that led to and attended your coming into possession of said coupons. Are you the owner of the bonds to which said coupons were attached? If not, then state who is; and in either event state, if you know, where said

bonds now are and in whose possession. Describe fully and particularly the transaction through which said coupons came into your possession; when it was made, with whom, its nature and terms and consideration, and when the consideration arose, and every fact and circumstance connected therewith; declare fully.

3rd int'r'g'y. What is the extent of your interest, if any, in this suit? Is, or are any other person or persons interested in said suit or in the recovery in said suit, should there be a recovery? Is any other person interested in said coupons sued on in this suit? If you answer yea to either of the foregoing questions in this interrogatory, then state who is so interested, to what extent, and how? and state fully and particularly what kind of an interest you have in said suit, and how you acquired such interest.

31 4th. Do you, or not, know whether said coupons ever belonged to a firm of the name of Henry Clews & Co., lately doing a banking business in the city of New York? If yea, state of whom said firm consisted; when they owned said coupons, from whom they received them, and whether as collaterals or absolutely, and what they gave for them, and how they paid for them, and to whom and when. And state, if you know, to whom said firm transferred them, and when, and for what consideration; and under what agreement, and for what purpose; and state, if you know, all the transfers of said coupons from the time they passed from said firm of Henry Clews & Co., until they came to your possession, giving the names of the parties, the consideration of such transfers, their dates, and all the facts and circumstances attending each.

5th inter'g'y. State, if you know who owned said bonds and coupons in September, 1873, and how long such person continued to own them. And what he gave for them, and how he got them, and to whom and when he transferred them, or parted with them; and for what

32 consideration—and for what purpose. Are you the absolute owner of said coupons now? Were you when this suit was begun? if yea, from whom did you get them; when did you get them; what did you give for them? how did you pay for them; why did you get them? and state fully and specifically the entire transaction and all the facts and circumstances connected therewith; and whether or not you still own said coupons; and, if not, who does own them?

6th. Did you, or not, ever have any correspondence with said firm of Henry Clews & Co., or any other firm by that name, or with the assignees or trustees of any such firm in relation to said bonds or coupons? if yea, state with whom and when, and attach copies of all the letters you wrote in such correspondence and the originals of all you received. Have you done so? if not, why not? Did you or not ever have any correspondence with any person or persons (besides your counsel) in relation to said bonds and coupons, or either? and if yea, attach copies of all the letters you wrote on that subject, and the originals of all letters you re-

33 ceived. Have you done so? if not, why not?

7th inter'g'y. Is your answer or any part thereof to the 2nd interrogatory hereinabove propounded based on information? If yea, from whom and when and how did you receive such information? Did you or not see or examine these interrogatories, or a copy thereof, before you came to answer them? Did you or not authorize any person to have this suit brought in your name? Was it so brought by your direction, or by the direction of some one else, and if the latter, by whom?

BARNES AND SON,
BRAGG & THORINGTON,
Defendants' Att'ys.

Cir. c't U. S., mid. dist. of Alabama.

RICH'D C. DANIEL
vs.
CITY OF OPELIKA.

To Richard C. Daniel, plaintiff in said cause, or Messrs. Sayre and Graves, his att'ys of record.

Take notice that the foregoing interrogatories are on file in the office of the clerk of the circuit court of the United States for the middle district of Alabama, and that a commission will issue so soon as
34 by law the same can issue to Minor Meriwether and R. G. Pillow, esqrs., as commissioners, to take and certify the deposition of said witness, Richard C. Daniel; said commissioners and said witness all reside in the city of Memphis, in the State of Tennessee.

BARNES & SON,
BRAGG & THORINGTON,
Def'd'ts' Attorneys.

Filed May 9th, 1877.

J. W. DIMMICK, *Clerk.*

Executed by serving copy of the within on *on* Sayre and Graves, att'ys-at-law, in Montgomery, May 9th, 1877.

GEO. TURNER,
U. S. Marshal,
By J. D. WILLIFORD, *Dep'ty.*

Commission to take deposition.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To Minor Meriwether and R. G. Pillow, esqrs., of Memphis, Tennessee, or either of you:

Know ye, that we, having full faith in your prudence and competency, have appointed you commissioners, and by these presents do authorize you, or any one or more of you, at such time and place as you
35 may appoint, to call before you and examine Richard C. Daniel, as witness in behalf of defendant in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein Richard C. Daniel is plaintiff and the City of Opelika is defendant, on oath to be by you administered, upon interrogatories annexed to this commission, to take and certify the deposition of the witness, and return the same to our said circuit court instanter under your hands and seals.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of May, A. D. one thousand eight hundred and seventy-seven.

Issued 19th May, A. D. 1877.

[L. S.]

J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. District of Alabama.

Deposition of Richard C. Daniel.

In the circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

36 The deposition of Richard C. Daniel, a witness sworn and examined under and by virtue of a commission hereto attached, issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending, between Richard C. Daniel, plaintiff, and the City of Opelika, defendant.

RICHARD C. DANIEL, of Memphis, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say:

1st. To the first interrogatory he saith: I reside in Memphis, Tenn.; aged 41 years, and have retired from active business; am a plaintiff in this suit; have resided in Memphis since 1860, except an absence of several years. Resided in Kentucky before I came here.

2nd. To second interrogatory he sayeth: I cannot state fully and particularly the cause of action, except that I brought this suit against the defendant for certain indebtedness due me, which indebtedness, amount, and character, is particularly set forth in the declaration; and was upon certain coupons from certain bonds issued by defendant. I cannot describe the bonds; I do not know the amount each, nor how many constitute the series, to whom payable, at what rate of interest, by whom signed, and when payable. I cannot state what coupons are embraced in this suit, nor when they fell due, nor what are their numbers. I cannot state when I came into possession of said coupons, nor the consideration, nor agreement. I cannot say whether the agreement was in writing or orally, nor can I state the terms thereof, as I do not remember them, nor have I any recollection of the terms. It is my recollection that a part of such coupons were obtained from F. Nelson, Tappan, and C. F. Timpson, of New York, and a part from other persons, whose names I do not remember. The consideration was passed at the time and subsequently, and I acquired an interest in said coupons at the time of their delivery, by performing certain service and transacting certain business, and agreeing to perform certain services for the persons who transferred to me the said coupons. I cannot state from

38 whom the coupons were purchased except Tappan and Simpson, nor can I state whether from Tappan or Simpson, nor the time. The same were obtained from New York. I did not take them as security, but purchased an interest in them, as I have hereinbefore stated. I do not know from whom the person or persons from whom I received them obtained the bonds, or coupons.

To second interrogatory No. 2, he saith: I cannot state from whom and when I learned the existence of said coupons. The first information was not in writing, nor have I any information in writing that is accessible. I cannot state the substance of such information; nor can I give all the facts and circumstances connected with my coming into possession of said coupons and bonds. I don't remember the facts, except that I came into possession of certain coupons & bonds in the way above stated. I am an owner in part, or an interest in certain bonds issued by defendant, and which I presume are alluded to in this inter-

rogatory, but I cannot state whether I own the bonds, or own an interest in the bonds to which said coupons were attached. I do not
39 know who are the owners of the bonds, nor where they now are, nor in whose possession. I cannot state particularly the transactions under which the coupons came into my possession, except that I obtained said coupons from certain parties in New York, by performing for them certain services and agreeing to do certain other things which I have done, and by reason of these I acquired an undivided interest in the coupons so acquired. This transaction was made two or three years ago; I cannot remember the time, nor the names of the parties, except Tappan or Simpson. I cannot now give the terms, nature, and consideration of the transaction, except what I have heretofore stated; nor any of the facts & circumstances except what I have heretofore given. I cannot declare any fact in connection with the transaction, except what has been stated hereinbefore, except that so far as the parties named, Tappan & Simpson, and others from whom I obtained any of the coupons I agreed to perform certain services for them, which I did so perform, and by which I acquired an undivided interest in the coupons. There was an agreement made with them
40 which was partly in writing and partly verbal; but I cannot now state precisely the full terms, nor any of them, as I do not now remember them, or any of them, except what I have before stated. The written agreement is in the hands of the parties from whom I obtained the said coupons.

3rd. To the third interrogatory he saith: I own an undivided interest in the coupons, and that interest is between $\frac{1}{6}$ & $\frac{1}{4}$ thereof. The residue of interest is owned by other persons. There are other persons interested in the coupons sued on in this writ. I do not know who are such owners or interested in the coupons, nor what extent they are interested except what I have heretofore stated, nor how. I have already stated my interest in such coupons, and the way by which they were acquired.

4th. To fourth interrogatory he states: I do not know whether the said coupons ever belonged to the firm of Henry Clews & Co., of New York. I had been informed that Henry Clews & Co. once owned some bonds and coupons of a like kind, but I don't know that such
41 embraced the coupons of this suit. I do not know of whom the said firm consisted at the time they owned any of such coupons; nor from whom they received them. I don't know how they received them, nor what they gave for them, nor how they paid for them, nor to whom and when. I do not know to whom said firm transferred them, nor the time nor the terms of transaction or consideration, and under what agreement and purpose. I do not know anything in reference to any transfers made by Henry Clews & Co., of any such coupons.

5th. To the fifth interrogatory he saith: I do not know who owned the coupons & bonds in 1873 (Sept.), nor how long such person continued to 'wn them, nor what he gave for them, nor how he got them, nor to whom and when he transferred them; for what consideration or what purpose. I am owner in said coupons to the extent as I have heretofore stated, and was the owner to that extent when this suit was begun. I have heretofore stated that I obtained coupons from Tappan & Simpson, and others in New York. I do not remember
42 when I got them. I have stated the consideration, and how I paid for them. I cannot answer why I got them. I have already stated everything that I can remember in reference to the matter en.

quired about in this interrogatory. I have stated what interest I hold in said coupons.

6th. To the sixth interrogatory he saith: I never had any correspondence with Henry Clews & Co., in reference to such coupons or bonds. I had some correspondence with persons who, I was informed, were assignees or trustees of that firm, in relation to some of said coupons. The persons were either Tappan or Simpson, or both; I cannot say which. I never retained copies of any such letters, nor can I find the letters, which I received from them. I have looked for them. I do not remember holding any correspondence with any other person than my counsel in reference to these coupons or bonds, except Tappan and Simpson. Therefore I cannot attach any such letters.

7th. To seventh interrogatory he saith: My answer to this is as
43 fully explained in my answer to second interrogatory as it is possible for me to make, and I refer to it. I did not examine these interrogatories before I came to answer them, nor any copy thereof. I did authorize my counsel to bring this suit in my name, and I presume he acted upon my authority, and I do not know any other person who gave authority to my counsel to bring the suit.

Further deponent saith not.

R. C. DANIEL.

I, Minor Meriwether, one of the commissioners in said commission named, do hereby certify that the evidence of the witness, R. C. Daniel, was written down by the witness himself, under oath, and subscribed by him in my presence on the 22d day of May, 1877, at my office, 35 Madison street, in the city of Memphis, in the State of Tennessee, and that I have personal knowledge of said witness, and that I am not of counsel in the cause, or of kin to any of the parties or in any manner interested in the result thereof.

Witness my hand and seal.

[SEAL.] MINOR MERIWETHER,
Commissioner.

Fee $10.00; postage 20—$10.20.

44 Published by consent of the parties this 25th day of May, 1877.
J. W. DIMMICK, *Clerk.*

The defendant then offered in evidence the second deposition of the plaintiff taken on behalf of defendant by leave of the court on the 13th day of August, 1877, and which is in the following words:

In the circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL,
vs.
THE CITY OF OPELIKA.

Additional interrogatories propounded, by leave of the court, to the plaintiff, Richard C. Daniel, by the defendant, the answers to which, when taken, will be used in evidence on the trial of said cause.

1. Interrogatory. State when you first came into possession of the coupons sued on in this action, and from whom you got them, and for what consideration, and under what agreement, and, if the agreement

is in writing, attach the writing to your answers hereto; and if
45 it is not in your possession, then state who has it. If you say the consideration was the performance of certain services and the transacting of certain business by you, then state fully and particularly what such services were and what such business was, when did you perform such services and when did you transact such business, and for whom, and with whom, and give the nature and character thereof fully & specifically.

2. Interrogatory. How many of the coupons sued on did you get from F. Nelson Tappan and C. F. Simpson, and under what agreement did you get them from said parties, and for what consideration and what interest therein do you own, and who owns the remainder of such interest. What consideration did you give for your interest therein; and if you say you performed certain services therefor, and transacted certain business, state fully and specifically what services you so performed, and what business you so transacted, as the consideration for said coupons, and state the agreement under which such services
46 were performed and such business was transacted—declare fully.

3. Int'g'y. How many of said coupons sued on did you get from other persons than said Tappan & Simpson, and who were such other persons; and what interest in such coupons did you acquire from such other persons, and under what agreement and for what consideration; and if such consideration was services rendered by you and business transacted by you, then state fully and particularly of what such services and business consisted, for whom they were performed, and when and at whose instance.

4. Int'g'y. State fully and particularly what services and business transactions you meant on your former examination in this case when you said that the consideration of the transfers of said coupons to you was certain services and business transactions performed by you for those who made the said transfers of said coupons; declare fully and particularly what such services and business transactions were. Have you declared the same as fully and particularly as you can do so?

47 5. Int'g'y. How and from whom did you first learn of the existence of said coupons; if by correspondence attach the same to your answers hereto. Have said coupons ever been in your possession; if yea, when and from whom did you receive them, and for what purpose and under what agreement and understanding. Give the names of the persons besides yourself who, you say, are interested in these coupons; and state why this suit was brought in your name alone, and what agreement there is between you and such other persons as to the amount that may be recovered in this suit, how and between what persons is it to be divided, and what agreement is there between you as to the counsel fees and costs and expenses in said suit. If there is any written agreement in relation to these matters attach the same to your answers hereto; why did not the other owners of said coupons join with you in said suit; what consideration, if any, are you to receive for the use of your name in said suit?

6th int'g'y. We now ask you state specifically and clearly what
48 is your interest in the coupons sued on in this case; when did you acquire such interest, from whom, what did you give for it, how did you pay for it, why did you acquire it, do you still own such interest; and declare fully the entire transaction, and all the facts and circumstances connected therewith; examine your papers, and if you have any letter or letters relating to these coupons, or any of them, or

to this suit (excepting such as may be from your counsel), attach the same to your answers to these interrogatories. Have you done so; if not, why not? What interest, if any, have J. Nelson Tappan and C. F. Simpson, of New York, in these coupons, and how did they acquire their interest therein, and from whom, and when; state all you know on that subject; attach to your answers hereto all correspondence you have had with said Tappan and Simpson, or either of them, in relation to this suit or said coupons, and give the substance of all conversations (if any) that you have had with said persons, or either of them, about said suit or coupons.

7. Int'g'y. State every fact and circumstance showing or tend-
49 ing to show that the coupons here sued on, and the bonds to which they were attached, or either, were once the property of Henry Clews & Co., of New York, and at what time they so owned them—declare fully.

8. Int'g'y. Have you, in answer to the foregoing interrogatories, stated as fully and particularly as you are able, the agreement under which you acquired an interest in the coupons here sued on, and the consideration, and terms, and time, and the services you were to render, and the business you were to transact as a part of such consideration, and all the facts and circumstances connected with your ownership of said coupons? If not, do so now, fully and particularly.

9. Int'r'g'y. Are you not simply allowing the use of your name in the collection of these coupons for an interest therein or in the recovery thereon? If not, then state why the suit was brought in your name alone, who placed the coupons sued on in the hands of the counsel who brought the suit, from whom did they receive their instructions, and who has the actual control of the litigation?

50 10. In your former deposition you stated that your first information as to these coupons was not in writing, and that you had no information in writing that was accessible. Please state to what writing you referred as inaccessible, and why it was inaccessible, and whether it is still inaccessible; if yea, state the contents of it, and if no, then attach the same to your answers hereto. Have you done so—if not, why not?

11. Int'g'y. State anything further within your knowledge touching the matters involved in this suit that will be material in this cause.

In the circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

To Richard C. Daniel, plaintiff, or Mess. Sayre & Graves, his atty's of record in said cause:

Take notice that the foregoing interrogatories are on file, by leave of the court, in the office of the clerk of said court, and that a commission will issue so soon as by law the same can issue, to Minor Meri-
51 wether, esq., of Memphis, Tennessee, as commissioner, to take and certify the deposition of said witness according to law.

The said witness, Richard C. Daniel, and the said commissioner reside in the city of Memphis, in the State of Tennessee.

BRAGG & THORINGTON,
Def'd't's Att'ys.

J. W. DIMMICK, *Clerk, &c.*

Filed the 10th of July, 1877.

J. W. DIMMICK, *Clerk.*

Service accepted by copy of the within.
July 12th, 1877.

SAYRE & GRAVES,
Pl'ff's Att'ys.

Commission to take deposition.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To Minor Meriwether, esq., of Memphis, Tennessee:

Know ye that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you, at such time and place as you may appoint, to call
52 before you and examine Richard C. Daniel of Memphis, Tennessee, as witness in behalf of defendant, in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein Richard C. Daniel is plaintiff, and The City of Opelika, Alabama, is defendant, on oath, to be by you administered, upon interrogatories annexed to this commission; to take and certify the deposition of the witness, and return the same to our said circuit court to be holden on the first Monday in November next, under your hand and seal.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23rd day of July, A. D. one thousand eight hundred and seventy-seven.

Issued July 23rd, A. D. 1877.

[L. S.]

J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. District of Alabama.

Deposition of Rich'd C. Daniel.

53 In the circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

The deposition of Richard C. Daniel, witness sworn and examined under and by virtue of the annexed commission, issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein pending between Richard C. Daniel, plaintiff, and The City of Opelika, defendant:

RICHARD C. DANIEL, of Memphis, Tennessee, being duly sworn to

speak the truth, the whole truth, and nothing but the truth, doth depose and say, as follows:

1. In answer to first direct interrogatory, deponent answereth: I do not remember; I cannot state positively, but I presume they were had from Tappan & Timpson, of New York. I must explain this: Several years ago, I do not now remember when, I visited New York for the purpose of purchasing the bonds of Opelika and other towns & counties in Alabama, the purchase to be made in behalf of self and others. I held interview' with Tappan, Timpson, & other holders of such bonds and coupons, and, instead of buying them for money, I arranged to
54 visit Alabama and investigate the circumstances and law under which the bonds were issued, and in consideration of these services and expenses I incurred in counsel fees and traveling expenses I was to have an interest in all the bonds and coupons held by the parties interviewed. The agreement was verbal. I have stated in part the kind of service, but I visited New York, and also Alabama, several times for the purpose of making sure of the law authorizing the issue of the bonds, also the law for the raising and collection of taxes. In these trips I incurred much expense and performed much labor, and incurred liability for counsel fees. All these expenses I paid, and performed the services as a part of consideration for my interest in the bonds and coupons. I agreed also to undertake the negotiation of selling the bonds, if opportunity presented, or to institute suit for the establishment of their validity and collection of the past due coupons by suit. All the coupons sued on were received in this way. I would state that all such bonds and coupons were transmitted direct from New York to my counsel
55 in Alabama, and I do not know whether bonds and coupons were sent by Tappan & Timpson only, or also by other holders whom I interviewed. My Alabama counsel, in my behalf, receipted for them. I performed a part of the services as hereinbefore stated, and within the past three years, and I am to perform the residue of service hereafter in selling the bonds and coupons, or prosecuting the suits for the holders of the bonds and coupons.

2. In answer to second interrogatory, he sayeth: I do not know; I have never had any statement from them or from my counsel. I own an undivided interest to the extent of about one-sixth of bonds and coupons. I do not know who owns the remainder of such interest. I have already stated the consideration given by me for my interest. I have already stated the agreement as to services, and how performed, and to be performed.

3. In answer to the third direct interrogatory he sayeth: I cannot state for the reasons stated. I do not now remember. I have stated
56 what interest I was to acquire from the holders of the bonds, whom I saw, and the consideration & agreement. I have answered this part of the question as fully as possible. The agreement with all the holders was the same.

4. In answer to fourth interrogatory he sayeth: I have already declared as fully as I can in reference to this matter of service, namely, that in consideration of the services already mentioned, for moneys incurred in travelling expenses and attorney's fees, and the further service of disposing of the bonds and coupons or prosecuting suits, I was to receive the interest named. I have declared as fully as I can do.

5. In answer to fifth interrogatory he sayeth: I cannot state how I first learned of the existence of such coupons, because I don't remember. I do not think it was by correspondence. I do not think said coupons

were ever in my possession; it is possible that a few of such had been. I can't state when they came into my possession, if at all; nor from whom they came. I have some recollection of receiving a lot of
57 coupons from Tappan from other bonds, not Opelika, and I am under the impression that among them were a few Opelika. I do not know what other persons are interested in the coupons. The suit was brought in my name in order that I might have entire control and management of them. I have stated the agreement as to my interest. The balance over and above my interest is to go to the holders of my attorney's receipts. If such are Tappan and Timpson, then they are to receive this balance, but if other holders had transmitted the bonds & coupons under my agreement, they who hold my attorney's receipts are also to receive their balance. I am to pay counsel fees and costs in consideration of the interest I acquired.

There is no written agreement. I did receive some letters in reference to some of these, and other matters disconnected with these suits, which letters I forwarded to my counsel or misplaced. I cannot tell why the holders of other bonds & coupons did not join in the suit. It was my understanding when I made the contract that I was to
58 have an interest in most if not all of the bonds and coupons; and under this understanding went to work. I am not to receive any consideration for the use of my name in said suit.

6th. In answer to sixth interrogatory he sayeth: I have stated everything that I possibly can in reference to my interest in said coupons, and as when I acquired such interest, namely, within three years; and from whom; and the consideration given for them; & how paid for. I can't say why I acquired the interest, except to make something out of them. I do still own such interest. I cannot declare any further fact in connection with the transaction. I have examined my letters and cannot find any relating to this suit, except those from my attorneys; nor any letters relating to these coupons. I don't know what interest J. Nelson Tappan and C. F. Timpson have in these coupons; nor how they acquired it, or when they acquired it. I am under the impression that they obtained some of the coupons from Clews & Co., but
59 do not know it. I cannot recollect having any special correspondence with Tappan & Timpson in reference to these coupon or this suit. If I ever received any such letters I have either sent them to my attorneys or mislaid them. I cannot recollect the substance of any conversation held with Tappan & Timpson in reference to the coupons and suit, except what I have already stated as to the agreement.

7th. In answer to seventh interrogatory: I do not know anything in reference to the matters enquired about in this interrogatory. So far as the bonds and coupons furnished to this suit by Tappan & Timpson, I have been under the impression they had originally been the property of Clews & Co., but I do not know it. I cannot state whether Tappan & Timpson received them from the estate of Clews & Co. or from pledgees of the firm of Clews & Co. I do know that Clews & Co. failed, and that Tappan & Timpson become their trustees, but I do not know anything further as to their connection with Clews & Co. as it re-
60 spects these bonds & coupons. I inferred that the bonds & coupons furnished by them had been once in the possession of Clews & Co., simply from the fact that Tappan & Timpson were trustees of Clews & Co. I do not what time.

8th. In answer to eighth interrogatory: I believe that I have stated everything in relation to my ownership of these bonds & coupons.

9th. In answer to ninth interrogatory, I am not simply allowing the

use of my name for the collection of these coupons, or for an interest therein, or an interest in the recovery thereof. I have previously stated that the suit was brought in my name to give me entire control and management of them. The coupons were placed in the hands of the counsel bringing suit by being remitted direct from New York, and by the holders. Some of these came from Tappan & Timpson, and it is probable that a part came from others, as I had arranged with other holders on the same terms as with Tappan & Timpson. I do not remember who they were. The counsel bringing this suit re-
61 ceived instruction from me, and I have the actual control of the litigation.

10th. In answer to tenth interrogatory: In my former deposition I did not mean to say that I knew of any writing in existence that was inaccessible, or any that had been destroyed; nor did I mean to say that I referred to any writing once in existence, but at the time of my deposition inaccessible. I had not then given a thorough search for all writings in my possession in reference to the matters of this suit, and thought it possible that I might have overlooked some letter which would give you the information. I have not attached any writing to this of the kind mentioned, for the reason that I have not been able to find any. I cannot state contents of any paper of the existence of which I have no recollection.

11th. In answer to eleventh interrogatory: I cannot state any matter further touching this cause that would be material. And further deponent saith not.

R. C. DANIEL.

I, the commissioner in said commission named, do hereby cer-
62 tify that the evidence of the witness, Richard C. Daniel, was written by himself under oath, and subscribed by him in my presence on the 13th day of August, 1877, at my office, 35 Madison street, in the city of Memphis, State of Tennessee, and that I have personal knowledge of said witness, and that I am not of counsel in the cause, or of kin to any of the parties in interest, or in any manner interested in the result thereof. Witness my hand and seal.

[SEAL.] MINOR MERIWETHER,
Commissioner.

Fee, 10.00; costs & postage, .50—$10.50.
Published this 5th day of November, 1877, by general order of court.
J. W. DIMMICK, *Clerk.*

The defendant then offered in evidence the deposition of J. Nelson Tappan, which is in the following words:

In the circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

63 Interrogatories to be propounded on behalf of the defendant in the above-entitled cause to J. Nelson Tappan and C. F. Simpson, material witnesses for the said defendant, and the answers to which said interrogatories, when taken, will be read in evidence on the trial of said cause.

1st interrogatory. Where do you reside, and what is your age—are you acquainted with the plaintiff in this suit? If yea, state how long

you have known him, and where he resides, and what business, if any, he is engaged in, and how long he has been engaged in such business.

2nd interrogatory. Were you or not acquainted with one or more firms by the name of Henry Clews & Co., lately doing business in the city of New York, to wit, since the year 1869? If yea, state how many firms of that name or of a different, and what, name composed of the same members or in part of the same members did business in said city during the time mentioned; and state when each of said firms was organized, what business they were engaged in, and how was
64 long each continued in such business.

3rd interrogatory. Was there or not a firm in the city of New York in September, 1873, by the name of Henry Clews & Co? If yea, state of whom it was composed, and what business it was engaged in, and whether or not it has ceased to do business, and, if yea, when and for what reason. And if in answer to the next preceding interrogatory you have stated that a firm by the name of Henry Clews & Co. was organized in January, 1874, then state of whom it was composed, how long it did business; and if it has ceased to do business, then state when and why it ceased.

4th interrogatory. What relation, if any, do you bear to either, and which, of said firms of Henry Clews & Co.? If you say such firms existed, what interest, if any, have you in the assets of either, and which of said firms, and how and when did you acquire such interest, and what evidence have you of such interest? If in writing, attach the same or a copy thereof to your answers to these interrogatories, and if you
65 attach copies exhibit the originals thereof to the commissioners, and state why you do not attach such originals instead of copies.

5th interrogatory. State, if you please, whether either of said firms, and which, or you as the trustee, assignee, or other representative of either of them, ever at any time owned any bonds and coupons or coupons only issued by the town or city of Opelika, in the county of Lee, in the State of Alabama; and if yea, state whether the same were issued by the town or city of Opelika, when they were issued, for what purpose they purported to be issued, of what denomination, and in what series of numbers were they issued; what rate of interest, and where and how payable and to whom payable; and if you can do so attach a copy of one of said bonds and one of said coupons to your answer to these interrogatories, and state the numbers of the bonds, and coupons so held by either of said firms or by you as the representative of either of said firms; state from whom and when they were received, for what consideration and on what account; what was the total amount
66 so held and where are they now? If they have been disposed of in any manner state when, to and by whom, how, for what consideration, and for what purpose, and who owns the same now? And if any of the coupons to said bonds have been disposed of as aforesaid, state how many, when they fell due, to and by whom they were disposed of, for what consideration and for what purpose, and who owns them now, and when disposed of. Have or not any of said bonds or coupons ever passed into the hands of said Richard C. Daniel? If yea, state when and from whom, and for what consideration, and for what purpose, and which of said bonds or coupons, by number & date of maturity; and state all the facts and circumstances connected with their passing into his possession; and if you say that any of said bonds or coupons ever passed into the hands of Prentice Bros., of New York City, then state when, from whom, for what consideration and for what purpose they so passed, and what was done therewith by Pren-

67 tice Bros., if you know. And state who composed said firm of Prentice Bros. at that time, and where each member of said firm now resides. State, if you know, who owns said bonds and coupons now. Where are they now, and how many of them are there, and what are their numbers?

6th. State, if you know, whether either or both of the firms of Henry Clews & Co., if you say there were two such firms, ever owned or possessed any bonds and coupons or either, and which, made and issued by the town of Opelika, in the county of Lee, in the State of Alabama, in January, 1868, for one thousand dollars each, payable January 1st, 1890, at the agency of the Eufaula, Opelika, Oxford, and Guntersville Railroad Company in the city of New York, with interest thereon at the rate of eight per centum per annum, payable on the 1st days of July and January of each year at said agency in New York, and purporting to have been issued by said town of Opelika in payment of stock in the said railroad company, and having coupons attached for semi-
68 annual interest aforesaid. If yea, then state how many of said bonds and coupons were owned by said firms or either of them, and the numbers of said bonds; which of said firms owned them first, and from whom did said last-mentioned firm receive them, and on what account and for what consideration, and whether as collaterals or otherwise and how; and when they were first received by such firm and how long they held them.

To the witness, J. Nelson Tappan, alone: 7th interrogatory. Are you or not the assignee or trustee of the estate & property, rights and credits of the firm of Henry Clews & Co. that was first organized, if you say there was two such firms? and if you are, then look at the books of said firm, and obtain and attach to your answers hereto full and correct copies of all entries, statements, and memoranda relating to or referring to the bonds last above enquired about, or in anywise connected therewith. Have you done so? If not, why not? And if you find such entries, please state by whom and when they were made, and what
69 connection, if any, the person or persons who made such entries or memoranda had with said firm, and where such person or persons now is or are.

8th int'r'g'y to C. F. Simpson, alone: Are you or not the assignee or trustee of the estate and property, rights and credits of the firm of Henry Clews & Co. that was last organized, if you say there were two such firms? and if you say you are, then look at the books of said firm, and obtain and attach to your answers hereto full and complete copies of all entries, statements, and memoranda relating to or referring to the bonds hereinbefore inquired about, or in anywise connected therewith, and state by whom such entries, statements, and memoranda were made, and the connection, if any, that the person or persons who made them had with such firm, and where such person or persons now is or are. Have you done so? If not, state why not.

9th. State every fact and circumstance within your knowledge showing or tending to show that said firms of Henry Clews & Co., or
70 either of them, or either of you, as their trustee or assignee, are or is the owner of the said bonds herein inquired about, and the nature and extent of such ownership.

BARNES & SON,
BRAGG & THORINGTON.
Att'ys for Def'd't.

Circuit court of the United States for the middle district of Alabama.

RICH'D C. DANIEL }
vs.
CITY OF OPELIKA. }

To Richard C. Daniel, plaintiff, or to Mess. Sayre & Graves, his att'ys of record:

You will take notice that the foregoing interrogatories are on file in said cause, the same having been propounded by said defendant to J. Nelson Tappan and C. F. Simpson, material witnesses for said defendant, and that a commission will issue so soon as by law the same can issue to Watson J. Hildreth, 291 Broadway, N. Y., and Mason Young, esqrs., as commissioners to take & certify the answers of said witnesses. Said commissioners and said witnesses all reside in the city and State of New York.

BARNES & SON,
71 BRAGG & THORINGTON,
Att'ys for Def'd't.

We hereby accept service of within interrogatories, waive copy and affidavit and notice, and agree to be bound hereby as if the same were served by the U. S. marshal.

April 30, 1877.

SAYRE & GRAVES,
Pl'ff's Att'ys.

Filed 4th day of May, 1877.

J. W. DIMMICK,
Clerk.

Commission to take deposition.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama

To Watson J. Hildreth and Mason Young, esqrs., or either of you

Know ye, that we, having full faith in your prudence and competency, have appointed you commissioners, and by these presents do authorize you, or any one or more of you, at such time and place as you may appoint, to call before you and examine J. Nelson Tappan and C. F. Simpson, as witnesses in behalf of defendant in a case pending in the
72 circuit court of the United States, for the middle district of Alabama, at Montgomery, wherein Richard C. Daniel is plaintiff, and The City of Opelika is defendant, on oath to be by you administered, upon interrogatories annexed to this commission; to take and certify the deposition of the witnesses, and return the same to our said circuit court, to be holden on the first Monday in May inst., under your hands & seals.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 4th day of May, A. D. one thousand eight hundred and seventy-seven. Issued May 4th, A. D. 1877.

[L. S.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Alabama.

In the circuit court of the United States for the middle district of Alabama.

RICHARD C. DANIEL
vs.
THE CITY OF OPELIKA.

By virtue of the commission hereto annexed, issued from the
73 office of the clerk of the circuit court of the United States for the middle district of Alabama, I, one of the commissioners therein named, have called and caused to come before me the said J. Nelson Tappan, one of the witnesses named in said commission, on this fourth day of June, A. D. 1877, at my office, No. 49 Nassau street, in the city of New York, in the State of New York, and I having duly cautioned and sworn the said witnesses to speak the truth, the whole truth, and nothing but the truth, I, Nelson Tappan, the said witness, deposeth & saith as follows:

First. To the first interrogatory he saith: New York City; forty-four; I am acquainted with plaintiff in this suit; I have known him about 18 months; he resides in Memphis, Tennessee; he is a banker; I don't know how long he has been a banker.

Second. To the second interrogatory he saith: I was acquainted with two firms by the name of Henry Clews & Co.; the old firm was composed of Henry Clews and Theodore S. Fowler, and the new firm was
74 composed of Henry Clews and Ernest Zeidler; I don't know when the old firm was organized; it suspended business in Sept. 23d, 1873; the new firm commenced business Jan. 5th, 1874, and suspended about Oct. 20th, 1874; both firms were engaged in the banking business; I do not know of other firms in which either partner in these mentioned was a partner during the periods named.

Third. To the third interrogatory he saith: Each firm ceased to do business because it failed. The remainder of my answer to this interrogatory is the same as my answer to the second interrogatory herein.

Fourth. To the fourth interrogatory he saith: I am trustee of the old firm of Henry Clews & Co., in bankruptcy; I hold the assets of said firm as trustee for the benefit of its creditors; the order of my appointment as trustee is dated Feb. 18th, 1875; the evidence of my interest as trustee is the order of the United States district court for the southern district of New York appointing me trustee; the original is not in my control, and I have no copy which I can attach; the original is on file in the said district court.

75 Fifth. To the fifth interrogatory he saith: I hold 24 bonds as trustee in bankruptcy of the old firm of Henry Clews & Co. of $1,000 each of the town of Opelika, Lee County, Alabama, numbered from 2 to 25, inclusive, issued in behalf of the Eufaula, Opelika, Oxford, and Guntersville Railroad, bearing interest at the rate of eight per cent. I think they were issued in January, 1868, payable in January, 1890. I think they are payable in currency. I cannot attach a copy either of bond or coupon, as they are not now in my possession, having been sent away for collection by the advice of Mr. Daniel, the plaintiff, Nov. 26, 1875, to Josiah Morris & Co., Montgomery, Alabama, and they are still held by them for my account as trustee; there were 24 coupons sent by me of $40 each, taken from said bonds and sent July 9, 1875, to R. C. Daniel, for collection, on account of the estate; these bonds were received by me from my counsel W. A. Abbott, with other assets of the estate of Henry Clews & Co., in the spring of 1875; I have never

disposed of any of them in any manner except that under an order of court one-half interest in said Opelika bonds were assigned
76 by me to C. F. Simpson, trustee in bankruptcy of the new firm of Henry Clews & Co. in accordance with a decree made in the United States district court for the southern district of New York, dated May 19th, 1876, ordering a division of certain assets between the trustees of the two firms of Henry Clews & Co., on a basis of the settlement of the matters in dispute between them in the suit of J. Nelson Tappan, trustee, against Cornelius F. Timpson, trustee. Subject to said decree, I am still the owner of all of the said bonds and coupons which I have ever received. I know of no other bonds or coupons, except those before mentioned, which have passed into the possession of Mr. Daniel. I don't know of any such bonds or coupons having passed into the hands of Prentice Brothers, nor do I know who composed that firm. None of these bonds or coupons have been in the possession of Prentice Brothers since they came into my hands, shortly after my appointment in the spring of 1875.

Sixth. To the sixth interrogatory he saith: In addition to the bonds and coupons which I have already mentioned the old firm held
77 only one other of the same issue, which was number one, which was sent in August, 1873, by Henry Clews & Co. to Josiah Morris & Co. I know nothing of the holding of any bonds of that issue by the new firm. These bonds were received by Henry Clews & Co. as security for large cash advances made to the Eufaula, Opelika, Oxford and Guntersville Railroad. From the entries in the books of that firm it appears that they received them in November, 1870, and that they were received from J. L. Pennington, president of the Eufaula, Opelika, Oxford and Guntersville Railroad. I do not know what disposition they made of them, except that I found them among their assets when I took possession as trustee.

Eighth. To the eighth interrogatory he saith: The only entries which I find in the books of the old firm of Henry Clews & Co. relating to the bonds are in the package-book which contained entries of all bonds received and delivered. These entries were made by Theodore S. Fowler, or rather are in his handwriting. He was a partner in the firm. He is now in the city of New York. Paper, marked Ex-
78 hibit one (1), signed by me and annexed to this deposition is a copy of such entries.

Ninth. To the ninth interrogatory he saith: I have no answer to make further, except what is contained in the answer already made by me to the foregoing interrogatories. I own, as trustee, bond No. 1, hereinbefore mentioned.

J. NELSON TAPPAN.

I, Mason Young, one of the commissioners in said commission named, do hereby certify that the foregoing testimony and answers were taken down and written in my presence and in the presence of the witness, J. Nelson Tappan, by Walter D. Edmonds, who is not of counsel or kin to either of the parties to said cause, nor interested in the event thereof; that the said testimony and answers so taken down and written as aforesaid in the words of the said witness were read over to him; that he assented, swore to, and subscribed the same in my presence at the time and place herein mentioned; that I have personal knowledge of the personal identity of the said witness; that I am not of counsel or kin to either of the parties to said cause, nor interested in the
79 event thereof, and I enclose the said testimony, together with

said commission and the interrogatories, to the said clerk of the circuit court of the United States for the middle district of Alabama, whence the same emanated, as my full execution of said commission.

Given under my hand and seal **this fourth day** of June, A. D. 1877.

MASON YOUNG,
Commissioner.

EXHIBIT No. 1.

NEW YORK, *Nov.*, 1870.

Bonds representing cash advanced on account of the Eufaula & Opelika R. R.

* * * * * * *

Town of Opelika, 1–25, inclusive.

NEW YORK, *Aug.*, 1873.

Forwarded to Josiah Morris & Co. 1 town of Opelika bond No. 1.

J. NELSON TAPPAN.

Published this 5th day of Nov. 1877, by general order of court.

J. W. DIMMICK, *Clerk.*

80 And here the defendant rested in its proof.

The plaintiff then introduced JOSIAH MORRIS, as a witness, who, being sworn, testified that he resides in the city of Montgomery, Alabama, and was engaged in the business of banking in said city, and had been for a number of years; that he received, about March, 1874, a package by express from plaintiff sent from Memphis, and containing the bonds and coupons mentioned in the complaint and amended complaint.

Plaintiff also introduced W. M. SHOEMAKER, as a witness, who, being sworn, testified that he was agent of the Southern Express Company and in charge of their office in said city of Montgomery, and had been such agent for about six years; that on or about March, 1874, a package was received at said office addressed to said Josiah Morris, and purporting to be from plaintiff, from Memphis, Tennessee, and purporting to contain bonds and coupons; that he did not open said package, and did not know its contents.

This was all the evidence in said cause.

The court of its own motion, among other things, charged the
81 jury as follows, to wit:

"Champerty is not predicable in a suit on negotiable paper, where the holder relies on his possession of the bonds sued on, and relying upon that title and right, and not upon the contract alleged to be champertous, comes into court to enforce it." And to this portion of the charge of the court the defendant then and there excepted.

The court also then charged the jury as follows: "The plaintiff having offered in evidence the bonds sued on, they are prima facie evidence, in the hands of a bona fide holder, that they were legally issued, and the burthen of proof is upon the defendant, to show that the facts set up in the 4th plea are true." And to this charge of the court the defendant then and there excepted. The defendant then requested the court to give the jury the following written charges:

Charge No. 1.

The defendant asked the court to charge the jury as follows:

If the jury believe all the evidence in this case, the contract by which

the plaintiff acquired authority from the assignees in bankruptcy,
82 or trustees in bankruptcy, of Henry Clews & Co., to bring this suit, and under and by virtue of which plaintiff did bring this suit, is champertous and void and conferred upon the plaintiff no such title as authorized him to bring this suit, and the jury must find for the defendant.

Charge No. 2.

If the jury find from the evidence that there was a contract by and between the plaintiff and the trustee or trustees of Henry Clews & Co., by which the plaintiff in consideration of services rendered by him in investigating the bonds and coupons sued on in this case was to take said bonds for collection, and that the plaintiff under said contract was to sue on said bonds and coupons in his own name, and that the plaintiff was to pay all the costs and counsel fees of such suits, and that for such services and expenses incurred by him, the plaintiff by the said contract was to receive an interest in said bonds and coupons of one-fourth or one-sixth of the same, and that under said contract the plaintiff brought this suit and is now prosecuting the same; and that
83 this is the only interest or title which the plaintiff had in or to the coupons sued on at the time this suit was commenced or now, then such contract was champertous and void in law, and the plaintiff had no such title or interest in the coupons sued on as in law authorized him to commence this suit or to prosecute it now, and the jury must find for the defendant.

Charge No. 3.

If the jury believe from the evidence in this case that the plaintiff came into possession of the coupons sued on in this action under and by virtue of an agreement with the owners thereof that plaintiff should undertake the collection thereof, and should sue thereon in his own name and at his own expense, and that in consideration thereof he should receive one-sixth or other portion of the amount or amounts recovered by plaintiff in such suit or suits as he should maintain pursuant to such agreement, then the jury must find for the defendant.

Charge No. 4.

84 If the jury believe from the evidence that this suit was instituted by the plaintiff under and by virtue of an agreement between the plaintiff and the owners of said coupons, by the terms of which agreement the plaintiff was to institute said suit in his own name and bear the expense thereof, and receive in consideration thereof a portion of the amount that might be recovered in said suit, then the jury must find for the defendant.

Charge No. 5.

If the jury believe from the evidence that the coupons sued on in this action were the property of J. Nelson Tappan and C. F. Timpson, as assignees or trustees in bankruptcy of the two firms of Henry Clews & Co., respectively, or the property of either said Tappan or said Timpson as assignee or trustee of either of said firms in bankruptcy, and that said coupons were part of the assets in bankruptcy of said firms or of

either of them, and that said coupons were transferred and delivered to plaintiff by said assignees or trustees, or by either of them, then such transfer and delivery are void and passed no title to plaintiff to
85 said coupons, unless the proof further shows that such transfer and delivery was authorized by the court by which said assignees were appointed.

Charge No. 6.

If the jury believe from the evidence that the coupons sued on in this action, before they came into the hands of plaintiff, were held by J. Nelson Tappan and C. F. Timpson as assignees or trustees in bankruptcy of said two firms of Henry Clews & Co., and were transferred and delivered by said assignees or trustees to plaintiff, then in order to entitle plaintiff to recover in this action the proof must further show that said assignees or trustees were duly authorized by the court of bankruptcy that appointed them as such assignees to make such transfer and delivery of said coupons to plaintiff.

Charge No. 7.

If the jury believe from the evidence that the coupons sued on in this action were obtained by the plaintiff from J. Nelson Tappan and C. F. Timpson as the assignees or trustees in bankruptcy of the estates of the two firms of Henry Clews & Co. and that said coupons were when
86 so obtained by plaintiff part of the assets of said bankrupt firms, in the hands of said assignees, and that by the terms of the agreement under which said coupons were so obtained the plaintiff was to institute suit thereon in his own name, and at his own expense, and in consideration thereof was to receive a certain portion of the amount that might be recovered in said suit, and that the proof fails to show that the said assignees or trustees in bankruptcy were duly authorized by the court that appointed them to make such an agreement, then the jury must find for the defendant.

Charge No. 8.

If the jury believe from the evidence that the plaintiff acquired said coupons sued on in this action from the assignees or trustees in bankruptcy of said two firms of Henry Clews & Co., then they must find for the defendant, unless the evidence also satisfies them that said bankrupt firms before their bankruptcy were themselves purchasers of said coupons for value and without notice.

87 *Charge No. 9.*

If the jury believe from the evidence that the coupons sued on in this action are the property of J. Nelson Tappan and C. F. Timpson as assignees or trustees in bankruptcy of the said two firms of Henry Clews & Co., or the property of either said Tappan or Timpson, as assignee of either of said firms, and part of the assets in bankruptcy of said firms or of either of them, then they must find for the defendant.

Charge No. 10.

If the jury believe from the evidence that the plaintiff acquired said coupons from J. Nelson Tappan and C. F. Timpson, assignees or trustees

in bankruptcy of said two firms of Henry Clews & Co., or from either of said persons as assignee of either of said firms, and that said coupons when so acquired by plaintiff were part of the assets of said two firms or of either of them, in bankruptcy, and that by the terms of the agreement by which said coupons were so acquired by plaintiff the said plaintiff was to institute suit thereon in his own name, and at his own expense, and in consideration thereof was to receive a portion of the amount
88 that might be recovered by such suit, and that this suit was instituted by plaintiff pursuant to such agreement, then the plaintiff is not a bona fide holder of said coupons without notice, and the burthen of proof is on him to show that a proposition was submitted by the president and a majority of the directors of said Eufaula, Opelika, Oxford and Guntersville Railroad Company to said town of Opelika, proposing to said town of Opelika that it should subscribe for and take an amount of the capital stock of said railroad company set forth in said proposal, at a certain price per share, and pay for the same in bonds of said town of Opelika, set forth in said proposal; and that such proposal was delivered to the corporate authorities of said town of Opelika, and that such proposition from said railroad company was approved by a majority of the corporate authorities of said town of Opelika, and that a resolution to that effect was passed by a majority of said corporate authorities, and that such resolution was entered upon the minutes of said corporate authorities within ten days
89 after receiving such proposal, and that such proposal and a special election was ordered and conducted by said corporate authorities according to the requirements of law for holding elections for town offices in the said town of Opelika.

Charge No. 11.

If the jury believe from the evidence that the plaintiff acquired said coupons from J. Nelson Tappan and C. F. Timpson, as assignees or trustees in bankruptcy of said two firms of Henry Clews & Co. respectively, or from either of said assignees or trustees, and that said coupons, when so acquired by plaintiff, were part of the assets in bankruptcy of said two firms, or of either of them, and that by the terms of the agreement by which said coupons were so acquired by plaintiff the said plaintiff was to institute suit thereon in his own name, and at his own expense, and in consideration thereof was to receive a portion of the amount that might be recovered by such suit, and that this suit was instituted pursuant to such agreement, then the plaintiff is not a bona fide holder of said coupons without notice, and the burthen of
90 proof is on him to show a substantial compliance by the officers and agents acting for said town of Opelika in making and issuing said bonds and coupons, with the terms and provisions of an act of the general assembly of the State of Alabama, entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests."

Charge No. 12.

A municipality, such as the defendant in this case is, must have legislative authority to subscribe its bonds to a railroad company before its

officers can bind the body corporate to the payment of bonds or coupons purporting to be issued on that account. Such officers cannot rightfully dispense with any of the essential forms of proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter of such a subscription; and if they do, the
91 bonds they issue will be invalid in the hands of all that cannot claim protection as bona fide holders.

13.

To be a bona fide holder of coupons, such as are sued on in this case, the plaintiff must be himself a purchaser of said coupons for value, without notice of any invalidity attaching to them, or he must be the successor in title to said coupons of one who was a bona fide holder of them without notice of any invalidity attaching to said coupons. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in bonds and coupons issued by a city or town which, upon their face, refer to the statute under which they were issued is bound to take notice of the statute and of all its requirements.

The court refused to give each of said written charges, and to such refusal the defendant then and there excepted, excepting separately to the refusal of the court to give to the jury each of said several
92 charges.

After the court had charged the jury, and before the jury had retired, the plaintiff moved the court for leave to amend the complaint, as appears by the amendment thereto filed May 9, 1879, which motion the court granted, and to the granting of this motion by the court the defendant then and there excepted.

And the defendant tenders this its bill of exceptions in said cause, and prays that the same may be signed and sealed, as such, in term time by the presiding judge, which is accordingly done.

June 11th, 1879.

[SEAL.] JOHN BRUCE, *Judge.*

Filed June 11th, 1879.

J. W. DIMMICK, *Clerk.*

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the middle district of Alabama, greeting:

Because in the record and proceedings, as also in the rendition
93 of the judgment of a plea which is in the said circuit court, before you, between Richard C. Daniel as plaintiff, and The City of Opelika as defendant, a manifest error hath happened, to the great damage of the said The City of Opelika, defendant as aforesaid, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to

the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of June, in the year of our
94 Lord one thousand eight hundred and seventy-nine.

[SEAL.] J. W. DIMMICK,
Clerk of the Circuit Court of the United States for the Middle District of Alabama.

Certificate of Clerk.

UNITED STATES OF AMERICA,
Middle District of Alabama, ss:

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, in the fifth circuit, hereby certify the foregoing, contained on pages numbered from 1 to 94, inclusive, to be a true and correct transcript of the record and proceedings in said court, in a case lately pending therein, wherein Richard C. Daniel was plaintiff and the City of Opelika was defendant, as the same appear of record and of file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said district, this 11th day of August, A. D. 1879.

[SEAL.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

95 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the middle district of Alabama, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Richard C. Daniel as plaintiff, and The City of Opelika as defendant, a manifest error hath happened, to the great damage of the said The City of Opelika, defendant as aforesaid, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said

Supreme Court, the 27th day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.]

J. W. DIMMICK,
Clerk of the Circuit Court of the United States
for the Middle District of Alabama.

Allowed by—

(Indorsed:) No. 105. R. C. Daniel vs. City of Opelika. Writ of error.

(Indorsement on cover:) No. 649. The City of Opelika, plaintiff in error, vs. Richard C. Daniel. M. Alabama C. C. U. S. Filed 18th October, 1879.

Supreme Court, the 27th day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

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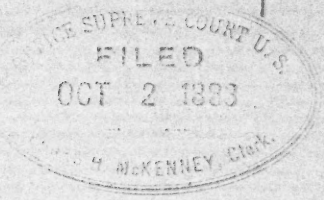

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

THE CITY OF OPELIKA,
Plaintiff in Error,

vs.

RICHARD C. DANIEL,
Defendant in Error.

Error to the Circuit Court of the United States for the Middle District of Alabama.

BRAGG & THORINGTON
AND
JOHN T. MORGAN,
Attorneys for Pl'ff.

R. O. Polkinhorn, Printer, 632 and 634 D Street.

Supreme Court of the United States

OCTOBER TERM, 1883.

THE CITY OF OPELIKA,

Plaintiff in Error,

vs.

RICHARD C. DANIEL,

Defendant in Error.

Error to the Circuit Court of the United States for the Middle District of Alabama.

ASSIGNMENTS OF ERRORS, AND POINTS IN ARGUMENT, AND AUTHORITIES OF THE PLAINTIFF IN ERROR.

The plaintiff in error insists that manifest error has intervened in the record and proceedings of the court below to its inquiry, and assigns the following errors, to wit:

1. The court below erred in overruling the demurrer of plaintiff in error, as shown by the record, pages 5 and 11.

2. The court below erred in striking out the plea numbered 5, filed by the plaintiff in error, as shown by the record, pages .

3. The court erred in refusing to allow plaintiff in error to file the plea numbered six, as shown by the record, pages 10 and 11.

4. The court erred in allowing the defendant in error to

introduce in evidence the bonds and coupons sued on, as shown by the record, page 12.

5. The court erred in the charges given by it to the jury, as shown by the record, page 30.

6. The court erred in overruling each of the several written charges asked by the plaintiff in error.

7. The court erred in allowing the amendment to the declaration asked by defendant in error, as shown by the record, pages 30 to 34, inclusive.

JNO. T. MORGAN,
Attorney for Pl'ff in Error.

Points in Argument.

I. The only question raised by the demurrer, upon which we wish to insist, is whether or not the coupons are sufficient of themselves to support an action thereon, independent of the bonds.

An examination of these coupons will show that they are not independent and complete obligations that can be separated from the bonds, but, that on the contrary, viewed by themselves, they have no meaning whatever—and in this respect they differ from the form of all coupons that have come under our observation.

They do not show *by whom* they are issued or payable, *nor to whom;* nor do they refer to any statute by authority of which they were issued and detached from the bonds, as in this case, they have no legal sufficiency or completeness. We are not aware of any case, in which suits have been maintained upon coupons of this class unless they contained words of negotiability.

In the *City of Lexington* vs. *Butler*, 14 Wallace Reps. 295, this Court has said:

> "Coupons attached as interest-warrants to bonds for the payment of money, lawfully issued by Municipal Corporations as well as the bonds to which they are attached, when they are payable to order and are endorsed in blank, or are made payable to bearer, are transferable by delivery and are subject to the same rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes," &c.

See, also, *Clark* vs. *City of Janesville*, 4 American Law Reg., 591.

The coupons being incomplete and imperfect, the mere delivery of them to plaintiff did not invest him with the title thereto, and the interest which they represented could only have been recovered by suit on the bonds themselves.

Without arguing this branch of the case further, we insist that the Court erred in overruling this ground of the demurrer.

II. The next question arising upon the record grows out of the action of the Court in striking out the 5th plea, filed by the defendant, and in refusing to allow the defendant to file the 6th plea set out in the bill of Exceptions, because these pleas were sworn to by the Mayor of Opelika *on information and belief*.

The statute of Alabama, on the subject of verification of pleas of the character of these pleas, provides that they "must be verified by affidavit."

Code of Ala., § 2989.

Obviously, the purpose of this statute was to require good faith on the part of parties interposing pleas in abatement and pleas denying the ownership of the cause of action, and to prevent the interposition of dilatory pleas; and, in enforcing the requirements of the statute, the Courts must look to the nature and circumstances of such case. In

the very nature of the case at bar it is impossible for the present Mayor of the City of Opelika to make positive oath to the facts alleged in these two pleas. All the facts and circumstances attending the *factum* of these bonds and coupons had transpired years before he had come into office.

Bonds of this character are frequently made so as to mature twenty, thirty, and even fifty years after their execution; and it may well happen that questions as to their validity may not arise until after all the parties connected with the *factum* of the bonds are either dead or beyond the reach of the Court. In view of these considerations, and the fact that corporations can only speak and act through agents, and that these agents are constantly changing, to lay down and adhere to such a strict construction of the statute, as was adopted by the Court below in this case, would be to practically prohibit corporations from filing pleas of this kind.

This question does not seem to have arisen in the Supreme Court of Alabama, under this statute; but it was held in an early case in that Court, under a statute substantially the same as the present statute, that an affidavit made to a plea of *non est factum* by one of the defendants, that the facts stated in the plea "as to himself are true and as respects C. Boyles (his partner) he believes to be true," was sufficient.

Garner et als vs. *Simpson*, 1 Ala. Reps., (Minor) 67.

The statute in force at the time of this decision required that a plea of this character should be "accompanied with an affidavit of its truth."

There is no substantial difference between this language and the language of the present statute, and an affidavit to a plea that would be admissible under one would be good under the other.

III. The objections to the introduction of the bonds and coupons in evidence are predicated upon the fact that the statute incorporating the Town of Opelika constitutes the *Intendent and Council* of the Town, the *body corporate* under the corporate name of "Intendent and Council of the Town of Opelika. Acts of Ala. 1853–4, p. 454, § 3. And that was the corporate name up to and at the time the bonds purport to have been made and issued.

On February 8, 1860, the charter was amended, but the corporate name was left unchanged.

February 9, 1867, the charter was again amended, and the name left unchanged.

March 3, 1870, a new charter was granted, and the corporate name was changed to the City of Opelika.

(These statutes are all public statutes, and consequently are not set out in the bill of exceptions.)

At the time, therefore, that the bonds were made the body corporate was the "Intendent and Council of the Town of Opelika" and not the "Town of Opelika." The bonds offered in evidence were bonds made by the "Town of Opelika," a corporation, so far as aught appears to the contrary, as wholly different from this defendant as is the City of New York or Boston, and just as inadmissible in evidence as against the defendant in the court below as would have been bonds purporting to have been made by either of the above-named cities.

Ulrick et al. vs. *Ragan*, 11 Ala. Reps., 529.

We do not contend that under proper averments in the declaration that these bonds could not have been rendered admissible in evidence, but we do insist that under the declaration as it stands they were clearly inadmissible. Had the declaration averred that the "Intendent and Council of Opelika," a municipal corporation, &c., under the

name of the "Town of Opelika" made, issued and put in circulation certain bonds, &c., &c., then we think that the bonds would have been competent and relevant testimony. But the case presented by the record is very different from that.

IV. The portion of the charge given by the Court of its own motion, set out on page 30 of the record, and the first four charges requested by appellant, raise the question of champerty, and in order to a proper understanding of these charges it is necessary to refer to the evidence on this subject.

It is contained in the second deposition of Daniel, the plaintiff in the Court below, and who was examined by the plaintiff in error. In his answer to the first interrogatory, page 22 Record, and answer to 4th Intgy., Record, p. 22; also answer to 5th Intgy., Record, p. 23.

From this testimony it is clear that the agreement under which Daniel acquired these bonds and coupons has all the elements of champerty in it as defined by the elementary writers and adjudicated cases.

Byrd vs. *Odem*, 9 Ala. Reps., 755;
Poe vs. *Davis*, 29 Ala. Reps., 676;
Chitty on Contracts, (11th Amer. Ed.,) vol. 2, p. 696;
Story on Contracts, (4th Ed.,) vol. 1, p. 711, § 581.

By giving the charge it did on this subject and refusing to give the instructions asked by appellant, the Court withdrew from the consideration of the jury the entire subject of champerty. It should have left to the jury to determine whether or not the facts existed which would constitute the contract champertous, and if so, then whether the plaintiff relied on the champertous contract, or upon his mere possession of the bonds and coupons—that is if the mere possession could be looked to at all in this case.

The charges numbered 5, 6, and 7 are predicated upon the theory that the bonds and coupons were held by Tappan and Timpson as the Trustees in bankruptcy of the two firms of Henry Clews & Co., and that they had no authority as such trustees to dispose of them in the manner in which they were disposed of to Daniel.

As trustees in bankruptcy they could dispose of the assets, of the estates they represented, only by *public sale*, or by *private sale under an order of the court*, and in no other way. Upon this subject the requirements of the bankrupt act are exceedingly stringent and guarded, providing for the infliction of fine or imprisonment upon an assignee who *wrongfully* sells or disposes of the property of the bankrupt estate, and also upon any person who combines or conspires with the assignee for such wrongful disposition of the property.

Rev. Statutes U. S., § 5062.

The right of the Trustees or assignees in bankruptcy to dispose of property of the bankrupt estate depends upon the statute, and he is bound to sell in the manner prescribed by the statute, or else his sale is a nullity.

10 Edi., Bump on Bankruptcy, page 569, and authorities there cited.

The testimony of Tappan, Record, pages 28 and 29, shows how he and Timpson held these bonds and coupons; and the deposition of Daniel, Record, pages 16, 17, 18, 22, 23 and 24, shows the contract under which they were passed to Daniel, and that it was a contract that was void under the statute above cited; and Daniel's two depositions also show that he knew the character in which Tappan and Timpson held the bonds and coupons.

The testimony of the defence having shown that the plaintiff had acquired the bonds and coupons from Trustees who only had power to dispose of them in one or the other

of two modes, the burthen was cast on plaintiff to prove that they were disposed of to him by the Trustees *in one or the other of those two modes.*

It is respectfully insisted that it was not competent for Daniel to rely simply upon his possession of the bonds and coupons, when the proof shows that, that possession was acquired under and by virtue of an illegal contract. One of the principal issues in the case was as to his ownership of the bonds and coupons, this question having been put in issue by a sworn plea—the evidence introduced by defendant (the plaintiff in error here) under this plea, having shown that Mr. Daniel acquired these bonds and coupons under a contract that was void, and that consequently he was not the owner of them we are unable to perceive how his mere possession, which is thus explained by defendant's proof, can help out his title. It could not be maintained that Daniel's possession could, under an issue as to the ownership of the bonds, help out his title, in any way, if the proof had shown that his possession was acquired by his having stolen them; and as we view the matter his mere possession cannot help him out when it is shown that the possession was acquired under an illegal and void contract, and for the making of which there is attached a severe penalty.

V. The charge of the court in relation to the burthen of proof (Record, p.) disposed of one of the most important questions in the case; and we respectfully insist that under the facts of this particular case it was erroneous.

The fourth plea (Record, p. 9) referred to in this portion of the charge of the court sets up a failure on the part of the Railroad and of the Town of Opelika to comply with all the material requirements of the law under which the bonds purport to have been issued—this plea really raises the question of authority for the issue of the bonds, and amounts to a special plea of *non est factum.*

When such an issue as that is presented in a case involving obligations of the character of those sued on here this court has made the rule plain as to *the burthen of proof*.

The rule announced by it in the case of *Chambers County* vs. *Clews* is as follows:

> "The logical and orderly mode of trial, where it was intended to investigate the issue we have been considering would be this. To sustain their claim the plaintiffs produce the bonds and coupons. The execution not being put in issue, this establishes the plaintiffs' case, and establishes presumptively that they are holders for value before maturity without notice. The defendant then produces such proof as it may possess—that the plaintiffs were not holders for value, or that they received the bonds after maturity, or that they had notice of the defects alleged. If it establishes either of these points *the question of authority in the agent is then open*." 21 Wallace, 323.

This is just the case for the application of that rule of proceeding.

The fourth plea, as we have said, is really a special plea of *non est factum*, and also puts in question the authority of the agents of the Town of Opelika to make and issue the bonds.

The plaintiff (Daniel) introduced the bonds and coupons and the statutes under which they purport to have been issued. This established for him a *prima facie* case. The defendant then introduced the two depositions of Daniel and the deposition of Tappan, which show that Daniel was not a *bona fide holder for value*, and then the question of authority in the agents became *an open one*.

If that question then became an open one the burthen necessarily rested upon him who had the affirmation of the issue, and that, in this case, was upon Mr. Daniel. He averred in his declaration that these bonds and coupons (one of each of which is set out in his declaration) were ex-

ecuted and put in circulation by defendants under and by virtue of the act referred to in the bond; the fourth plea denied that the execution of the bond was authorized by the Town; the affirmative of the issue therefore was upon Mr. Daniel, and the burthen of proof was cast upon him to sustain the averments of his complaint, and this he utterly failed to do.

Now the charge of the court withdrew from the consideration of the jury the entire question as to the *bona fide holding by plaintiff* of the bonds, and was a determination *by the court* that Daniel was a *bona fide holder*—that was a question for the jury to ascertain from the evidence under the instructions of the court, but in this instance the court practically excluded all the evidence on that subject from the jury, and determined for itself that Daniel was a *bona fide holder*.

What has just been said on this subject also applies to the refusal of the Court to give the charges requested by the defendant below, numbered 10 and 11 and 12, Record pages.

VI. The action of the Court in giving the charge on the subject of the burthen of proof, and the refusal to give the charges last above referred to, could only be supported upon the idea that there was nothing in the proof showing or tending to show that Daniel was not a *bona fide holder for value*. Whether the evidence on this subject was conclusive or not it is unnecessary here to consider; but surely it cannot be said that there is no evidence whatever on that subject; if there was any evidence it ought to have gone to the jury, and if they had found from this evidence that Daniel was not a *bona fide holder* of said bonds for value, then they could not have fonud a verdict for plaintiff without also having found that all the requisites of the statute

under which the bonds were issued had been substantially complied with.

We consider it unnecessary to support the 13th charge asked by defendant below and refused by the Court. It is almost in the identical language used by this Court in numerour cases and especially in the case of—

McClure vs. *Township of Oxford*, 4 Otto's Reps., p. 432.

VII. The charge numbered nine asked by defendant below and refused by the Court ought clearly to have been given. The plea of defendant below numbered ———, expressly denied Daniel's ownership, and *issues was joined hereon by him.* (Record, p. —).

Tappan swears, (Record, p. —), that all the bonds and coupons belong to him and Timpson as trustees, &c., and that they have never parted with their ownership of them. This charge, therefore, should have been given and it should have been referred to the jury to determine from the evidence whether Daniel owned the bonds and coupons or not—they were the sole judges as to the evidence on that subject.

BRAGG & THORINGTON &
JNO. T. MORGAN,
Attorneys for Pl'ff.

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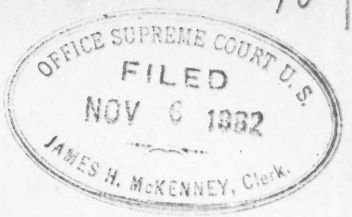

Supreme Court of the United States.

CITY OF OPELIKA
v.
RICHARD C. DANIEL. } *No. 649.*

SAMUEL F. RICE, for Appellee.

As to the question of jurisdiction, see Appellee's brief on file

Supreme Court of the United States.

CITY OF OPELIKA
v.
RICHARD C. DANIEL. } *No. 649.*

We insist that this court has no jurisdiction of this cause, for the reason that the sum involved is not five thousand dollars.* The suit was prosecuted to recover the amount of ninety coupons, for forty dollars each, attached to certain bonds—the whole sum being $3,600, and the judgment was for $4,775.64. The suit was on the coupons, and not on the bonds. The amount actually in controversy was $3,600. The record shows that this was the question submitted to the jury, and the one on which the judgment was rendered. The pleas were—1st, The general issue; 2d, To the jurisdiction of the court; 3d, That the coupons were not the property of the plaintiff; 4th, A special plea setting up the invalidity of the bonds; 5th, A plea of *non est factum*. The whole defense involved the validity and ownership of the coupons described in the complaint.

Lee v. Watson, 1 Wall. 337.

Issue was joined upon the 1st, 3d and 4th pleas, and it was in relation to the matters set up in those pleas that jurors were called and witnesses examined.

Rail Road Co. v. Trook, 100 U. S. 112.

The record does not show that Daniel has any interest in

* In determining whether the amount in dispute brings the case within the jurisdiction of this court, the amount actually in dispute in the particular case is the test.

No addition to that amount, as shown by the record, can be allowed or made *aliunde*.

Elgin v. Marshall, 106 U. S. R., 578, is conclusive in favor of the motion to dismiss this case for want of jurisdiction.

Also, 106 U. S. R., 5, 265 and 576.

Thompson v. Butler, 95 U. S. R., 694.

Western Union T. Co. v. Rogers, 93 U. S. R., 565.

any of the bonds, or is the holder of any coupons except those described in the complaint.

Paving Co. v. Mulford, 5 Wall. 208, and cases therein cited.
Troy v. Evans, 97 U. S. 6.
Thompson v. Butler, 95 U. S. 694.

The demurrer to the complaint presents no question which has not been determined by this court.

Mercer Co. v. Hackett, 1 Wall. 83.

The action of the court in striking out the 2d and 5th pleas, and the refusal of the court to allow appellant to file the 6th plea, was correct.

The 2d plea sets up no facts upon which a material issue could be taken.

White v. Rail Road, 21 How. 576.
Thomson v. Lee Co. 3 Wall. 331.
City of Lexington v. Butler, 282.

The Code of Alabama (p. 706) prescribes the form of the plea of *non est factum* as follows:

"A. B., plaintiff, v. C. D., defendant. } The defendant for answer to the complaint saith, that the note (or bond, as the case may be,) upon which the action was founded, was not executed by him, or by any one authorized to bind him in the premises; and he makes oath that this plea is true. (If filed by an executor or administrator, that he believes it to be true.)"

It is very evident, that the plea of *non est factum*, set out in the record, is substantially different from that required by the Code of Alabama. The affidavit is a part of the plea, and it is just as essential that the affidavit should conform to the law, as it is that the plea shall contain the proper averments. By the Code of Alabama, it must be alleged in the plea, absolutely and affirmatively, that the averments of the plea are true. The only exception is, that executors and administrators may swear that they believe them to be true.

The affidavit to plea No. 5 is made upon the best of the knowledge, information and belief of the affiant. It is an affidavit without any substance. No indictment for perjury would lie on it. By sections 3036 and 3037 of the Code, written instruments, the foundation of the suit or plea, are evidence without proof, unless their execution is denied, and the denial verified by affidavit. The effect of such a denial is to change the rule of evidence established by the statute. The law fixes the terms upon which alone this change can be made—that is, by affidavit denying, absolutely, the execution of the instrument by himself, or by any one authorized to bind him. The only exception is in the case of executors or administrators. The exception as to these shows that it was to apply to no others. This was first made an exception in the case of Martin v. Dortch, 1 Stew. 479, and afterwards by statute.

Moore v. Morris, 26 Ga. 479.
Wilson v. Adams, 15 Tex. 423.
Benton v. Brooks, 25 Ark. 215.
McCoy v. Harrell et al., 40 Ala. 232.
Alspaugh v. Winstead, 79 N. C. 526.
K. Fem. Orp. Sch. Trust. v. Fleming, 10 Bush, 234.

The plea not being properly framed and sworn to, according to the statute, was demurrable, or on motion might be properly stricken out.

Sorelle v. Elms, 6 Ala. 706.
Preston v. Dunham, 52 Ala. 217.
Ball v. Mayor and Council of Vicksburg, 23 How. 443.

Plea No. 6 offered to be filed was insufficient and defective, and for that reason ought not to have been allowed, but the time for pleading had passed, and it was in the discretion of the court to allow or reject it.

Steele v. Tutwiler, 57 Ala. 113.
Early v. Rogers et al., 16 How. 599.
McCargo v. Chapman, 20 How. 555.
Marine Ins. Co. v. Hodgson, 6 Cr. 206.

The effect of the plea of *non est factum*, is to impose upon the party offering the written instrument as evidence, the necessity of proving its execution. The effect of striking out, or sustaining a demurrer to the pleas, relieves the party of this duty. But if the plaintiff voluntarily does all that he would have been required to do, if the plea of *non est factum* had been properly interposed, then no injury has resulted from the action of the court in striking out the plea, even if the court erred in so doing; for "the rule is, that errors not injurious to the party complaining, will not avail to reverse."

Derry v. Cray, 5 Wall. 795.

Chambers Co. v. Clews, 21 Wall. 317.

We insist that the action of the court, in striking out the plea of *non est factum*, was not injurious to appellant.

That plea would put in issue the execution of the *coupons* sued on, and no other question or fact of law. The burden of proving their execution would be imposed upon the plaintiff in the suit, and nothing else. The record (p. 12) shows that the plaintiff did all he could have been required to do, if the plea had been in. The bonds purported to be executed by P. J. Wilkerson as mayor, and J. E. Williamson as treasurer. The plaintiff proved the signature of Wilkerson and of Williamson, and that they were, respectively, the mayor and treasurer of Opelika at the time they signed the bonds and coupons.

The execution of the bonds and coupons was thus legally established, by precisely the same evidence that would have been necessary under the plea of *non est factum*. The bonds and coupons were not offered nor received as evidence, until this was done. So that appellants had all the advantage of the plea of *non est factum*, to the same extent as if the court had overruled the motion to strike it out.

The 3d plea set up the defense that Daniel was not the owner of the coupons. Upon this issue the testimony of Daniel and Tappan was relevant. The defense of champerty was not made by the pleadings. The suit was not to enforce

any champertous contract. There was no pretense that the issue of the bonds and coupons was tainted with champerty. The question of champerty could only arise, therefore, upon the contract between Timpson & Tappan and Daniel; but that is not the contract upon which suit is brought, and it is one in which appellants have no interest.

The title of Timpson and Tappan is not assailed. It can make no difference to appellant upon what consideration the coupons went into possession of Daniel. The possession of the coupons carries "title with it." The possession and title are "one and inseperable," and satisfaction to Daniel would be satisfaction as to all the world.

Murray v. Gardner, 2 Wall. 121.

All the charges, therefore, in reference to champerty, were properly refused.

Upon the same principle, the court properly refused to give the charges from No. 5 to 13 inclusive.

The title of the trustees not being assailed, they had full power over the assets of the bankrupt.

Section 5103 Rev. Stat. U. S.

The burden of assailing Daniel's title was upon appellant, and he has failed to do so.

The appellee had a right to bring suit in his own name, and his authority to do so does not appear to have been disputed.

Moore & Jones, Adm'rs, v. Henderson, 18 Ala. 234.

Bancroft v. Paine, 15 Ala. 838.

The amendment of the complaint was properly allowed.

Humphries v. Dawson, 38 Ala. 203.

Johnston v. Marlin, 54 Ala. 272.

Harris v. Plant & Co., 31 Ala. 643.

S. F. RICE, for Appellee.

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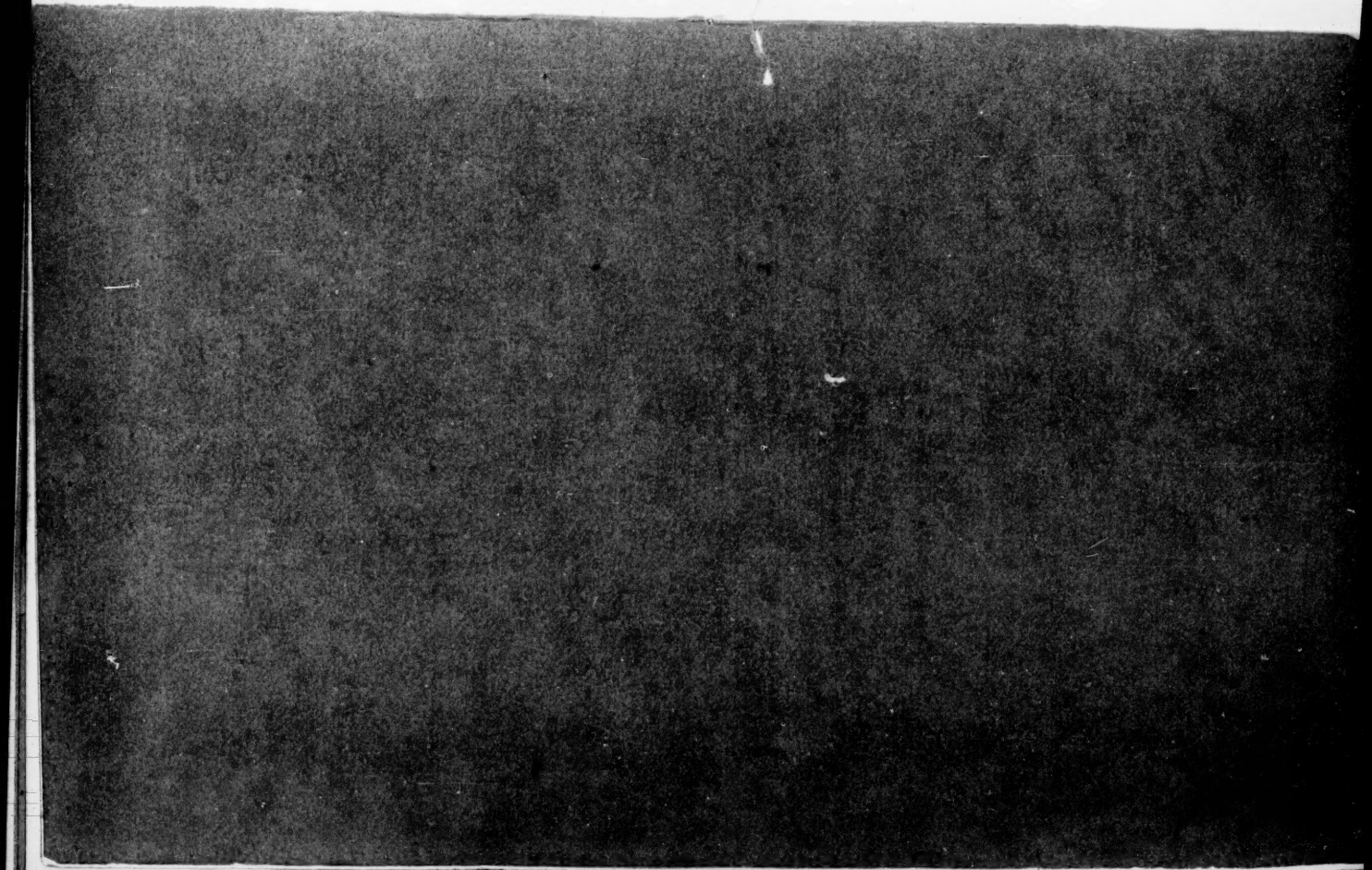
Supreme Court of the United States.

THE CITY OF OPELIKA, Appellant,
v.
RICHARD L. DANIEL, Appellee.

No. 649.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

SAMUEL F. RICE, for Appellee.



Supreme Court of the United States.

THE CITY OF OPELIKA, Appellant,
v.
RICHARD C. DANIEL, Appellee.

No. 649.

MOTION.

The Appellee moves to dismiss the writ of error in this cause, upon the ground that this Court has no jurisdiction thereof—the matter in dispute not exceeding the sum or value of *Five Thousand Dollars.*

In support of this motion, he refers to *Thompson vs. Butler*, 95 *U. S. R., p* 694. *Western Union Telegraph Company vs Rogers*, 93 *U. S. R. p* 565.

SAMUEL F. RICE,
For the Motion.